United States Court of Appeals

for the Second Circuit

EXHIBITS

77-7105

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 77-7105

- x

OSCAR ROBERTSON, et al., :

Plaintiffs, :

- against - :

NATIONAL BASKETBALL ASSOCIATION, et al., :

Defendants. :

- x

AMERICAN BASKETBALL ASSOCIATION, et al., :

Cross-Claimants, :

- against - :

NATIONAL BASKETBALL ASSOCIATION, et al., :

Cross-Defendants. :

- x

R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a/ Utah Stars, :

Cross-Claimant-Appellant, :

- against - :

FREDERICK P. FURTH, :

Appellee. :

- x

B

On Appeal From The United States District Court
For The Southern District Of New York

EXHIBITS TO BRIEF FOR CROSS-CLAIMANT-APPELLANT

WATSON LEAVENWORTH KELTON & TAGGART
Special Counsel Appearing for
Cross-Claimant-Appellant
100 Park Avenue
New York, New York 10017
(212) 683-4221

UNITED STATES COURT OF APPEALS
FILED
MAR 25 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

OF COUNSEL:

Thomas V. Heyman
Maxim H. Waldbaum
100 Park Avenue
New York, New York 10017

Robert G. Pierce
Butler, Landrum, Pierce and Turner
720 Kipling, Suite 201
Lakewood, Colorado 80215

TABLE OF CONTENTS

	EXHIBIT
Agreement for Professional Services of January 29, 1974	A
Formal Opinion No. 165 of the American Bar Association	B
"Attorneys' Settlement Covenants Not To Accept Future Cases: Antitrust And Ethical Considerations", Vol. 18, Catholic University Law Review, 412 (1969)	C
Informal Opinion No. 1039 of the American Bar Association, entitled "Can A Lawyer Ethically Sign An Agreement Which Settles His Client's Litigation When The Settlement Agreement Contains A Covenant That He Will Not Represent Other Plaintiffs Against The Defendant"	D
G.C. Croce v. The Superior Court of the City and County of San Francisco, 21 Cal. App.2d 18, 68 P.2d 369 (1st District Court of Appeals 1937)	E
Petty v. Superior Court, 116 App. Cal.2d 20, 253 P.2d 28 (2d District Court of Appeals 1953)	F
Arden v. State Bar of California, 52 C.2d 310, 341 P.2d 6 (Sup.Ct. of Calif. 1959)	G
Nichols v. Elkins, 408 P.2d 34, 2 Ariz. App. 272 (Ct. of Appeals of Arizona 1966)	H

BEST COPY AVAILABLE

AGREEMENT FOR PROFESSIONAL SERVICES

THIS AGREEMENT, made this 29th day of January, 1974, between the AMERICAN BASKETBALL ASSOCIATION, a Delaware corporation (herein referred to as "ABA"), together with each of its member teams (herein collectively referred to as "CLIENTS"), and attorney FREDERICK P. FURTH, 1330 Russ Building, San Francisco (herein referred to as "FURTH"):

WITNESSETH:

CLIENTS and FURTH hereby agree as follows:

1. EMPLOYMENT. CLIENTS hereby employ and authorize FURTH to investigate the business and legal affairs of CLIENTS with the National Basketball Association (herein referred to as "NBA"), its member teams and others and to prepare and file suit on behalf of CLIENTS against such entities for the recovery of damages and other relief based upon such antitrust and other causes as shall exist therefor. FURTH shall be responsible for and use his best efforts in conducting this investigation and litigation through trial and judgment and on appeal, on behalf of the interests of CLIENTS. FURTH shall have the right to associate such co-counsel as he, in his sole judgment, shall deem necessary to pursue the foregoing professional responsibilities; provided that FURTH understands that time is of the essence in the prosecution of the clients claims; provided, that CLients sole and total responsibility for the payment of legal fees and expenses for this investigation and litigation shall be to FURTH pursuant to this Agreement.

2. COMPENSATION. As compensation for the professional services rendered pursuant to this Agreement, CLIENTS shall make payments to FURTH as follows:

a. Retainer Fee. As a retainer fee, CLIENTS shall pay FURTH the sum of One Hundred Thousand Dollars ($100,000.00) (herein referred to as "RETAINER") in ten (10) equal, monthly installments of Ten Thousand Dollars ($10,000.00) beginning on the date of execution of this Agreement. The RETAINER shall not be deducted from or credited against other fees paid to FURTH by CLIENTS pursuant to this Agreement or otherwise, and FURTH shall have no obligation whatsoever to refund or return any part of the RETAINER

EXHIBIT A

to CLIENTS. If the RETAINER is not fully paid at the time of any recovery, settlement or dismissal, the entire unpaid balance shall become immediately due and payable to FURTH.

b. Contingency Fee. In addition to the RETAINER, CLIENTS shall pay to FURTH as further compensation a contingency fee of thirty-three and one-third percent (33 1/3 %) of any and all monetary recovery by CLIENTS, including attorneys' fees (herein referred to as "CONTINGENCY FEE"), whether such recovery results from settlement prior to suit, from judgment or from settlement after suit. In computing the CONTINGENCY FEE, the entire monetary recovery shall be added to any attorneys' fees awarded, the EXPENSES, as defined in Paragraph 3, shall be deducted therefrom, and thirty-three and one-third percent (33 1/3%) of the resulting amount will be paid to FURTH as the CONTINGENCY FEE. If a motion for a new trial is granted or an appeal is taken from a judgment of the trial court, the CONTINGENCY FEE shall be increased from thirty-three and one-third percent (33 1/3%) to forty percent (40%).

c. Discontinuance Fee. If, for any reason, a suit instituted pursuant to this Agreement is voluntarily dismissed or discontinued by CLIENTS, or is dismissed for CLIENTS' failure to prosecute or to comply with rules or orders of court prior to settlement or judgment, in lieu of the CONTINGENCY FEE, CLIENTS immediately shall pay to FURTH, in addition to the RETAINER, the following fee, computed by reference to the year in which such dismissal or discontinuance occurs (herein referred to as "DISCONTINUANCE FEE"):

Year of Discontinuance	Per Year	Total Discontinuance Fee
1974	$200,000.00	$200,000.00
1975	$100,000.00	$300,000.00
1976	$100,000.00	$400,000.00

An additional One Hundred Thousand Dollars ($100,000.00) shall be added to the total DISCONTINUANCE FEE for each year after 1976.

d. Non-Monetary Recovery Fee. In addition to the RETAINER, CLIENTS shall pay to FURTH a fee for NON-MONETARY RECOVERY, as hereinafter defined, by CLIENTS whether such NON-MONETARY RECOVERY results from settlement prior to suit, from judgment or from settlement after suit is filed or from voluntary dismissal or from dismissal for CLIENTS' failure to prosecute or to comply with rules or orders of court (herein referred to as "NON-MONETARY RECOVERY FEE"). For purposes of this Agreement, the term NON-MONETARY RECOVERY shall mean the happening of any of the following events during the period from the date of execution of this Agreement until eighteen (18) months after the date of a settlement, voluntary dismissal or for CLIENTS' failure to prosecute or to comply with the rules or orders of court of or in any suit filed pursuant to this Agreement:

(i) The creation or the agreement to create a a league which contains FIVE (5) or more current member teams of the ABA and eight (8) or more current member teams of the NBA; or

(ii) The consolidation or combination or the agreement to consolidate or combine into an existing or new league of FIVE (5) or more current member teams of the ABA with eight (8) or more current member teams of the NBA;

(iii) A joint, common or agreed draft or other allocation of basketball players between FIVE (5) or more current member teams of the ABA and eight (8) or more current teams of the NBA (the foregoing three events herein collectively referred to as "EVENTS".

~~(iv) Provided that after November 1[illegible], 197[illegible] [illegible] seven (7) or more [illegible] the [illegible] [illegible] paragraphs shall be reduced to [illegible] (1) or more.~~

The amount of the NON-MONETARY RECOVERY FEE will be as follows:

(a) If any of the EVENTS occur during a period from the date of execution of this Agreement until one hundred eighty (180) days after the date of a settlement, voluntary dismissal or dismissal for CLIENTS' failure to prosecute or comply with rules or orders of court (herein referred to as "FIRST PERIOD"), the NON-MONETARY RECOVERY FEE shall be Three Million Dollars ($3,000,000.00)

(b) If any of the EVENTS occur during a period comprised of one hundred eighty (180) days immediately following the expiration of the FIRST PERIOD (herein referred to as the "SECOND PERIOD"), the NON-MONETARY RECOVERY FEE shall be One Million Five Hundred Thousand Dollars ($1,500,000.00); and

(c) If any of the EVENTS occur during a period comprised of one hundred eighty (180) days immediately following the expiration of the SECOND PERIOD, the NON-MONETARY RECOVERY FEE shall be Seven Hundred Fifty Thousand Dollars ($750,000.00).

The NON-MONETARY RECOVERY FEE shall become payable upon the happening of any of the EVENTS, and shall be paid to FURTH in ten (10) equal annual installments beginning on a date thirty (30) days after the happening of the EVENT. Any payments of the CONTINGENCY FEE or the DISCONTINUANCE FEE to FURTH shall be credited against the NON-MONETARY RECOVERY FEE.

3. EXPENSES. CLIENTS shall pay all expenses of FURTH in connection with this representation. Such expenses shall include: costs of depositions; pretrial, trial and appellate transcripts; the printing or copying of briefs and other documents; document preparation and copying; extra secretarial expenses; reasonable travel expenses and other reasonable out-of-pocket expenses of FURTH related to this representation. FURTH shall bill CLIENTS monthly or quarterly as appropriate for such expenses.

4. LIEN. CLIENTS hereby assign FURTH a lien upon any recovery resulting from this representation, whether from settlement, judgment or otherwise, for all sums due FURTH for RETAINER, CONTINGENCY FEE, DISCONTINUANCE FEE, NON-MONETARY RECOVERY FEE and the expenses referred to in Paragraph 3.

5. SUCCESSORS, ASSIGNS AND FURTHER OBLIGATIONS. This Agreement shall inure to the benefit of and bind the parties, their successors, heirs, executors, personal representatives and assigns. Each of the CLIENTS signatory to this agreement further agrees as follows:

a. Any suit filed pursuant to this agreement may be filed in their corporate, partnership or other entity names.

b. The AFA is hereby constituted their agent for:

(i) Collection and payment of all moneys to be paid to FURTH pursuant to this agreement; and

(ii) Authorizing FURTH to add additional parties plaintiff or defendant; and

(iii) The allocations among present and future signatories of any damages or moneys received pursuant to this agreement.

e. In the event of dissolution of the ABA for purposes of forming a new league or for consolidating or combining with an existing league, the undertakings created by this agreement will become the ~~joint and~~ $ several obligations of ~~the~~ EACH INDIVIDUAL CLIENTS signatory hereto or their successors in interest ~~or~~ UNDER $ NON-MONETARY AWARD (paragraph 2d) UP TO THE FOLLOWING AMOUNTS: ~~is limited as follows:~~

1. $600,000.00 (paragraph 2 d(a))
2. $300,000.00 (paragraph 2 d(b)) $
3. $150,000.00 (paragraph 2 d(c))

per CLIENTS signatory and in a several and not joint undertaking.

FURTH

FREDERICK B. FURTH, Esquire

CLIENTS:

AMERICAN BASKETBALL ASSOCIATION AND ITS MEMBER TEAMS

Mike Storen

By Michael Storen, Commissioner

CAROLINA COUGARS

By Its Duly Authorized Agent

NEW YORK NETS

By Its Duly Authorized Agent

DENVER ROCKETS

By Its Duly Authorized Agent

SAN ANTONIO SPURS

Angelo Drone

By Its Duly Authorized Agent

INDIANA PACERS

By Its Duly Authorized Agent

SAN DIEGO CONQUISTADORS

By Its Duly Authorized Agent

KENTUCKY COLONELS

John Y. Brown Jr. agent Colonels

Its Duly Authorized Agent

UTAH STARS

By Its Duly Authorized Agent

MEMPHIS TAMS

W. H. Van Barkhoff

By Its Duly Authorized Agent

agent for C.O. Finley

VIRGINIA SQUIRES Basketball Club Prod Pty Ltd By Virginia Squires Basketball Club Inc By Earl Mitchell Pres

By Its Duly Authorized Agent

of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him. *Canon 11.*

Under this Canon, it is the duty of a lawyer, when he makes a collection, to remit promptly to his client. *Opinion 125.*

Every lawyer owes his client a duty not to divulge to others what he learns about his client's business by reason of his confidential relationship. See *Canon 37.* For an attorney to make disclosures that result in the fund being subjected to an adverse claim, without his client's consent, is a clear violation of this duty. The lawyer is not his client's financial guardian. If he can properly furnish information to the doctor and the hospital regarding his client's funds, so that attachment may be made thereof, why not to the grocer, the tailor, the wine merchant, or any other creditor? He certainly cannot undertake to see that his client's bills are paid. Such a practice would destroy immediately the trust and confidence so essential to the attorney-client relationship; the client would insist that the money collected be paid to him directly; and the entire system of collection by counsel would break down.

It is our belief, therefore, that however meritorious the claim, and however desirous the lawyer be to recognize it and assist in its collection, he may do so only with his client's consent.

FORMAL OPINION 164
(August 22, 1936)

A judge, without resigning, may become a candidate for another judgeship.

CANON INTERPRETED: JUDICIAL ETHICS 30

The inquiry is whether it is proper for a municipal judge, without resigning, to run for a district judgeship against the incumbent who seeks re-election.

The committee's opinion was stated by MR. MARTIN, Messrs. McCracken, Sutherland, Phillips, Arant, Ailshie and McCoy concurring.

The American Bar Association, in 1933, amended *Canon 30* of its *Canons of Judicial Ethics* by providing that, "While holding a judicial position, he [a judge] should not become an active candidate . . . for any office other than a judicial office."

Plainly, the intent of the amendment is to permit one holding a judicial position to become a candidate for another judicial office, and this he may do unless the law of his state prohibits; conduct lawful may be unethical, but if unlawful can never be ethical.

FORMAL OPINION 165
(August 23, 1936)

An attorney for several co-plaintiffs may name one of them, who wishes to discontinue litigation, as a co-defendant simply for the purpose of

EXHIBIT B

bringing him before the court as a necessary party if the attorney does not seek affirmative relief against such party and if by so doing he will not be compelled to disclose confidential communications. The attorney may seek to recover compensation for his professional services rendered to such a withdrawing client.

CANONS INTERPRETED: PROFESSIONAL ETHICS 6, 14, 37

A member of the Association has requested the opinion of the committee with reference to the following facts:

An attorney is employed by A and B, owners of a gasoline service station, and by C, their lessee of the station and assignee of an interest in the contract of A and B with D, a refining company, for the sale by D to A and B of certain gasoline, to bring an action against D for damages for an alleged breach of the contract. C verified the complaint as one of the plaintiffs. D filed a motion to compel A and B to set forth the interest of C in the contract by virtue of the assignment. The motion having been granted, an amended petition was prepared by the attorney, but C refused to sign it, and indicated his wish to discontinue the litigation. Thereupon the attorney filed an amended petition for A and B against C and D as co-defendants. As to the original defendant, D, the allegations are substantially the same as those contained in the original petition. As to the co-defendant, C, the amended petition simply recites that with the consent of D, A and B sublet their service station to C, "who claims some interest in the contract," and who thereafter operated the service station with the knowledge and consent of D, under C's contract with A and B. The amended petition does not charge C with any wrongful acts, nor does it seek any affirmative relief as against C. We are asked whether the conduct of the attorney is ethical. We are also asked whether the attorney may ethically seek to recover from C compensation for his professional services in representing him, in the first instance, as a plaintiff in the action.

The opinion of the committee, was stated by MR. MCCOY, Messrs. McCracken, Sutherland, Martin, Phillips, Arant and Ailshie concurring.

We are of the opinion that the conduct of the attorney in naming C as a nominal co-defendant in the amended petition, under the circumstances stated, is ethical. While an attorney must not accept professional employment against a client or a former client which will, or even *may* require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment (*Canon 6;* Galbraith vs. State Bar, 218 Cal. 329, 23 P. (2d) 291), we are of the opinion that this canon of professional conduct does not preclude an attorney for several co-plaintiffs from subsequently naming one of them as a co-defendant simply for the purpose of bringing him before the court as a necessary or proper party to the adjudication of the rights of the remaining plaintiffs, when he does not seek affirmative relief against such party. The attorney is not thereby accepting "employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." *Canon 6.*

We are also of the opinion that, under the circumstances stated, the attorney may, with propriety, seek to recover from C compensation for his pro-

fessional services while representing him, in the first instance, as a co-plaintiff in the action, bearing in mind, however, the admonition of *Canon 14* of the Canons of Professional Ethics, which declares that:

> Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

FORMAL OPINION 166
(November 15, 1936)

A judge should not participate in a commercially sponsored radio program which simulates courtroom scenes and purports to give legal advice to indigent persons through the reenactment of various kinds of cases.

CANONS INTERPRETED: JUDICIAL ETHICS 1, 4, 25, 34

Our attention has been directed recently to the radio program sponsored by a national advertiser, broadcast weekly over the national network of a large broadcasting company, entitled "Good Will Court." The announced purpose of the "Good Will Court" is to afford to indigent persons, unable to pay for the services of attorneys, means of securing advice with respect to their legal problems from judges of courts which are an integral part of the judicial system of the state, and to "inform the public." The obvious purpose is to promote the sales of the advertiser's product. Other programs of like nature are broadcast by individual radio stations elsewhere in the country.

The essential features of these programs are the appearance of the anonymous "clients," the assistance of an interlocutor who may or may not be an attorney, the stating of their "cases" to the judge, whose name is always prominently mentioned, and finally the advice and comments of the judge. In an hour's program ten or more "cases" may be thus disposed of, the proceedings being interspersed with the usual station announcements, reference to the name of the sponsoring advertiser and to the product which he sells. In many instances there is a proffer of further advice or assistance to the "clients." Quite often the programs are marked by discussions between the judge and the interlocutor, both as to the facts and the law, and by emotional outbursts of the "clients." The case is conducted so as to create the impression that usual court procedure is being followed, but the simulation is poor indeed and tends to create false impressions in the minds of the lay public respecting court procedure.

We are asked to state our views as to the propriety of the participation therein by judges, former judges, and attorneys.

The committee's opinion was stated by MR. MCCOY, Messrs. McCracken, Sutherland, Phillips, Arant, Houghton and Bane concurring.

At the outset we deprecate the simulation of an actual judicial proceeding by a group of lawyers or judges, and especially one having for its primary

Recent Developments

Attorneys' Settlement Covenants Not to Accept Future Cases: Antitrust and Ethical Considerations

> In an increasing number of [private antitrust] cases defendants have been insisting as a condition of settlement that the plaintiff's lawyer agree that neither he nor his associates will be involved in another case against the defendant for a five or ten-year period of time involving the same product . . . . In some cases, the request has been that plaintiff's lawyer agree not to bring *any* kind of case against the defendant . . . for a specified period . . . .[1] (Emphasis added.)

As an added condition to settlement, extraneous to the main litigation and binding on the attorney alone, it is his individual prerogative to agree to the condition and thereby limit his future practice. When his client is obtaining what he considers to be an advantageous settlement, refusal to accept the condition becomes especially unattractive. In such circumstances the attorney, with the welfare of his client in mind, is likely to agree to the condition.

What are the effects on the attorney who so agrees? Is such an agreement binding? Is he acting ethically when he agrees to so limit his future practice? Is the defendant's attorney who either suggests or includes the condition in the settlement acting properly?

Is the Attorney Bound?

The agreement by the plaintiff's attorney with the defendant is identical to the common law covenant not to compete. Absent any statutory considerations, is the attorney bound?

At common law covenants not to compete were categorized as: 1) ancillary, *i.e.*, a covenant subordinate to the main lawful purpose of a larger transaction (*e.g.*, employment or the sale of a business); and 2) nonancillary, *i.e.*, a "naked covenant not to compete."[2] The validity of the former was judged as to its reasonableness,[3] while there was a diversity of opinion on the treatment of the latter.[4] These defendant-plaintiff's attorney settlement covenants, not founded on any basic transaction between the at-

1. Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. Antitrust L.J. 87, 94 (1966).

2. S. Oppenheim & G. Weston, Federal Antitrust Laws 4 (1968).

3. 6A A. Corbin, Contracts §§ 1379-96 (1962); 5 S. Williston & G. Thompson, Contracts §§ 1636-53 (1937); Restatement of Contracts §§ 514-15 (1932).

4. According to Standard Oil Co. v. United States, 221 U.S. 1, 54-55 (1911), at common law all covenants not to compete, including those nonancillary, were judged by their reasonableness. But United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899), says that reasonableness applied only to ancillary covenants; nonancillary, having nothing to justify or excuse them, were void.

EXHIBIT C

torney and the defendant, are clearly nonancillary. Even if nonancillary covenants are to be judged by their reasonableness, these particular covenants are unreasonable and would be illegal at common law. Inquiry into reasonableness includes a consideration of the interests of the person seeking protection, of the person being restrained, and of the public. If the covenant reasonably protects the *valid* interests of these parties, it is allowed to stand.

Courts were established to allow redress to persons injured by others. Covenants not to accept future cases tend to insulate the defendant from liability to those he has wronged, thus protecting an invalid interest. The interest of the public is especially injured by the removal of counsel when his practice is highly specialized and there are few other practitioners in his area of expertise: all later claimants must duplicate the initial expenditures in preparing suit against the defendant. This results not only in a misallocation of resources, but also can effectively deprive the small claimant of legitimate redress. Since such a covenant does not protect any legitimate interest, unnecessarily restrains the attorney and cuts off the rightful redress of the small claimant, it can be viewed as void because contrary to public policy; under this view, such a covenant would not bind the agreeing plaintiff's attorney.

Antitrust Implications

Under section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal . . . ."[5]

Contract, combination, or conspiracy. The initial agreement between a defendant and a plaintiff's attorney establishes the restraining contract. But, as the same defendant settles more suits and the settlement covenants proliferate, a more broad horizontal conspiracy among covenanting attorneys may appear. Such a conspiracy must be based on some agreement among the attorneys. To establish agreement it has been suggested that the nexus between horizontal conspirators may be provided by the individual seeking their agreement to the plan.[6] "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."[7] Such parallel, if not exactly duplicated, action by a group of attorneys becoming in fact a practice in the settlement of litigation may establish conspiracy.

Restraint. The Supreme Court, construing the Sherman Act in *Apex Hosiery Co. v. Leader*,[8] reasoned: "[i]n seeking more effective protection of the public from the growing evils of restraints on the competitive system . . . the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such [illegal]

5. 15 U.S.C. § 1 (1964).
6. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 701 (1962).
7. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939).
8. 310 U.S. 469 (1940).

restraints wherever they occur in or affect commerce between the states."[9] Although Section 1 of the Sherman Act is literally all-encompassing, the courts have construed it to preclude only those contracts, covenants or conspiracies which unreasonably restrain trade or commerce.[10] To be legal all covenants not to compete must be at least reasonable, *i.e.*, meet the "Rule of Reason."[11] Clearly the defendant who covenants with 20 attorneys who have represented clients against him imposes a significantly more unreasonable restraint on those seeking redress than 20 separate defendants who each bind one attorney. The binding of one attorney may be a restraint if it acts to limit access to his services; a finding of unreasonableness here, however, would require that a significant number of qualified attorneys in the area of expertise be restricted.

Yet the courts have come to recognize that some restraints are conclusively presumed to be unreasonable per se by their nature or necessary effects.[12] "Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends."[13] The Supreme Court has applied the per se rule to concerted refusals to deal.[14] As the number of attorneys agreeing to such settlement covenants with a defendant increases, the presence of a group refusal to deal with those persons excluded by the covenants appears. The unreasonableness of the covenant is magnified in any area of the law in which there is a tendency to specialize, where the removal of even a small number of attorneys is relatively significant. Presently these covenants abound in at least one such specialized area, that of litigation of private antitrust actions.[15] Whether or not these nonancillary restraints should be placed among those classified as per se unreasonable,[16] under these circumstances they should be found violative of the Rule of Reason.

Interstate trade or commerce. Illegality under the federal antitrust laws rests on restraint of interstate trade or commerce. In determining which activities constitute interstate trade or commerce, the initial inquiry must decide which activities constitute trade or commerce.

The Sherman Act applies to sales of both services and goods.[17] Whether attorneys, in rendering professional services, are engaged in "trade" is an open question.[18] In

9. *Id.* at 497-98. *See also* Standard Oil Co. v. United States, 221 U.S. 1, 54 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).

10. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

11. The test is attributed to Standard Oil Co. v. United States, 221 U.S. 1 (1911).

12. The per se rule has been applied to agreements fixing prices, limiting production, dividing markets, establishing resale price maintenance, and setting up group boycotts and concerted refusals to deal. S. Oppenheim & G. Weston, *supra* note 2, at 19.

13. Report of the Attorney General's National Committee to Study the Antitrust Laws 12 (1955).

14. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 467-68 (1941).

15. Alioto, *supra* note 1; A.B.A. Comm. on Professional Ethics [hereinafter cited as A.B.A. Comm.] Informal Opinions, No. 1099 (1968).

16. See Comment, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 Va. L. Rev. 1165 (1959).

17. United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 489-92 (1950).

18. For a further discussion on the questionable nature of professional exemption from the antitrust laws, see Coleman, *The Learned Professions*, 33 A.B.A. Antitrust L.J. 48 (1967).

American Medical Association v. United States,[19] the Supreme Court, upholding a conviction of the Association for conspiring to coerce practicing physicians from accepting employment by Group Health (government employees' medical risk-sharing plan), avoided deciding whether a physician's practice of medicine was "trade," focusing on the commercial dealings of Group Health. More recently, however, the Court affirmed a decision by the United States District Court for the District of Utah which held: "[t]he fact that a pharmacist in filling a prescription is engaged in . . . a learned profession does not immunize [him] from the application of . . . the Sherman Act."[20] From this it might be conjectured that the Court would view an attorney litigating a case under the same light.

It is not necessary, however, for the application of the antitrust laws to these covenants that the attorney be engaged in "trade;" also being restrained are those engaged in commerce who cannot obtain his services. As Group Health was restrained, so are future claimants in need of the legal services for suit against the settling defendant.

It is unquestionable that the scope of the Sherman Act extends to the constitutional limits of the commerce power.[21] The interstate nature of trade or commerce restrained may be evidenced by the character of the activities of those seeking redress—the dealings of Group Health supplied the interstate factor necessary for the application of the Sherman Act in the *American Medical Association* case. Interstate character may also be established by widespread agreement to similar covenants by attorneys across the nation.

Illegality. The proliferation of such covenants creates an unreasonable restraint amounting to a concerted refusal to deal with a class of claimants needing professional service. When interstate in nature the conspiracy evidenced by parallel activity among attorneys comes within the boundaries of those contracts, combinations and conspiracies made illegal by the Sherman Act.

Ethical Considerations

The American Bar Association Committee on Professional Ethics has expressed significant concern for the ethical questions involved in these covenants.[22] The Canons of Professional Ethics of the ABA have been adopted, with some variation, by every state.[23]

The plaintiff's attorney. The attorney has the right to determine what cases he will

19. 317 U.S. 519 (1943).

20. United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 33 (D. Utah), *aff'd mem.*, 371 U.S. 24 (1962).

21. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, *rehearing denied*, 323 U.S. 811 (1944).

22. A.B.A. Comm., Informal Opinions, No. 1039 (1968).

23. Wright, *Study of the Canons of Professional Ethics*, 11 Cath. Law. 323, 325 (1965). Presently observed mainly as a disciplinary code rather than as positive standards, the Canons are now being revised by the ABA Special Committee on Evaluation of Ethical Standards. The need for revision is based on the difficulty in fitting the general principles first stated in 1908 into the context of present-day legal practice. Such difficulty, however, does not render the present Canons useless; their general standards are still applicable.

accept,[24] but the attorney with present clients has a duty to refrain from any action which may jeopardize their interests. The plaintiff's attorney owes a duty to his clients not to restrain the availability of his services. The attorney without present duties to the interests of other clients or potential clients still has a duty to his profession to refrain from illegal acts; this duty may extend to refraining from such covenants as the one under discussion. Furthermore, in agreeing to an illegal covenant to aid his client the attorney violates Canon 32: "No client . . . is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law . . . ."[25]

If one engaged in business acts unethically by making an agreement knowing it will not bind him or having no intention to abide by it, does the attorney act any less improperly in agreeing to a settlement condition knowing it to be void as against public policy? And is not knowledge of the unenforceability of such a covenant reasonably to be presumed to exist in the attorney, negating any claim of his lack of such knowledge?

The attorney who accepts additional consideration for the covenant opens himself to charges of double-dealing. For successful settlement of the suit he is paid by both litigants. If payment for the attorney's covenant becomes a practice, an unscrupulous attorney, motivated by an expectation of added consideration from the opposing party, might sacrifice his client's interest in advising settlement for less than the client should rightfully recover, in order to keep himself in good stead with the settling defendant.

The defendant's attorney. In aiding defendant to require the plaintiff's attorney to agree to this covenant, the defendant's attorney violates Canon 7, which condemns "[e]fforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer . . . ."[26] He is destroying the plaintiff's attorney's right to choose freely which clients he will represent and may be, in fact, destroying his practice. In addition, by suggesting, or including in the settlement at his client's request, the agreement of the plaintiff's attorney, the defendant's attorney may violate Canon 32 by rendering advice involving disloyalty to the law.

May the defendant's attorney request that the plaintiff's attorney give up his freedom when the reason for the request is the immunization of the defendant from suits in the public interest? The Ethics Committee has expressed the opinion that the answer to this question must be "no."[27]

Conclusion

Both the attorney who requests and the attorney who agrees to the covenant herein discussed are acting beneath those standards which the legal profession has established to govern the conduct of its members. In so agreeing the plaintiff's attorney may be violating the antitrust laws and making himself liable to prosecution. The defendant himself is equally violating the antitrust laws. The wise, ethical attorney would do better for himself and his client to avoid the inclusion of such a condition in settlement agreements.

24. ABA Canons of Professional Ethics No. 31.
25. *Id.* No. 32.
26. *Id.* No. 7.
27. A.B.A. Comm., Informal Opinions, No. 1039 (1968).

preparing abstracts of title. The fact that this corporation is owned in part by lawyers creates no problems. The fact that it competes with another privately owned abstract office likewise creates no problems. What must be observed, however, are the provisions of Canon 27, which make it unprofessional to solicit professional employment through direct or indirect advertisements. Such a company must not be designed in such a way as to directly or indirectly advertise the lawyers who are its stockholders.

In the present instance it appears from the facts submitted that the letter is designed to advertise the abstracting business and not the lawyer. However, it is conceivable that under a changed fact situation the advertising would be such that it could promote the legal business of the lawyer.

Therefore, in the absence of evidence that the abstracting company is being used to advertise its president as a lawyer, and his availability for professional employment, we conclude that we do not have a question of ethics presented.

Informal Opinion 1039 May 29, 1968
Can a Lawyer Ethically Sign an Agreement Which Settles His Client's Litigation When the Settlement Agreement Contains a Covenant That He Will Not Represent Other Plaintiffs Against the Defendant

You have asked for an opinion on whether a lawyer may ethically sign an agreement which settles his client's litigation when the settlement agreement contains a covenant that the lawyer will not represent other plaintiffs against the defendant.

You included in your letter of inquiry a statement to the effect that a good part of your practice involves private actions under the Antitrust Laws, and that there is an ever-increasing practice accompanying the settlements in such cases of taking from the plaintiff's counsel covenants not to sue or to aid in any suit against the settling defendants.

It is realized that government actions do not completely solve antitrust problems and litigation, and that the Supreme Court has many times recognized the critical roles of private litigants. In addition it is clear that the number of attorneys who specialize in the plaintiffs' sides of antitrust litigation are very limited.

You then asked the following four questions:

1. Can a lawyer ethically bind himself not to represent members of the public when his judgment is restricted by an agreement which may be against public policy and which deprives him of his freedom of choice?

EXHIBIT D

2. May the defense lawyer, in the foregoing situation, request or suggest that another lawyer give up his freedom where the basis for the request is to immunize the first lawyer's client from prosecution of cases which are very much in the public interest?

3. Is it ethical for a defense lawyer, once his client has arrived at an appraisal of a specific case, to then refuse a compromise of that case, at his client's request, unless the plaintiffs' attorney makes an agreement which is extraneous to that case?

4. Is it ethical for a defense lawyer to communicate or implement his client's desire to require an opposing attorney to agree to refrain from representing any client against such client?

It is the opinion of the members of the Committee that all of these questions should be answered in the negative, and while we do not have Canons clearly covering the matter, we believe that we have sufficient reason to justify the foregoing conclusions.

Specifically we believe that the action suggested violates the first phrase of the final paragraph of Canon 7, Canon 10, the final paragraph of Canon 15, the final sentence of Canon 29, the second sentence of Canon 30, the third sentence of Canon 31, and the first two sentences of Canon 32.

Legal Ethics by Henry Drinker, page 139 states:

"Canon 31 provides: 'No lawyer is obligated to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment.' Except where assigned by the court to defend those who cannot afford to pay counsel, the lawyer may choose his own cases and for any reason or without a reason may decline any employment which he does not fancy."

In Wise on *Legal Ethics*, page 175, we also find the following language, which we believe is applicable:

"No lawyer should try to 'encroach upon the professional employment of another lawyer'. On the other and it is the right of any lawyer to 'give proper advice' to those seeking relief 'against unfaithful or neglectful counsel', generally after communication with the other lawyer, however."

By way of the converse situation of the attorneys, we refer again to Canon 7, and a comment by Drinker, this appearing on page 198 of the same book:

"The first two paragraphs of Canon 7 are as follows: A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

"When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him."

The covenant that you refer to militates against the foregoing in that it imposes an undue restriction upon the plaintiffs' attorney and also affects the right of the client to obtain the benefit of the services to which he is entitled from his own lawyer. Because of the foregoing it is improper for the attorney representing the defendants to demand this kind of a covenant and by way of corollary it is improper for plaintiffs' attorney to abandon the interests of other clients, who have depended upon his services through periods that may be invaluable and of long standing. This same situation could apply to many other fields of law which require some specialization, including condemnation cases, products liability, personal injury actions requiring the application of medical trial techniques, the application of what is sometimes called legal medicine, in addition to many other areas involving engineering problems, family law, and corporate practices. Should such branches of the law be subjected to this same kind of a covenant, it could be highly detrimental to numerous relationships between attorneys and clients.

This opinion does not concern itself with settlement of class actions approved by the Court, as to which this Committee expresses no opinion.

One member of the Committee dissents.

Informal Opinion 1040 April 30, 1968
Brochure Prepared For Clients

Two questions involving the above subject have been independently submitted to the Committee:

1. You state that your practice consists largely of matrimonial law and that you have prepared a brochure which you propose to give to clients who retain you in reference to matrimonial problems, anticipating that this will save a great deal of time answering the same questions repeatedly for clients who consult you in this field. You state that the brochure is unsigned, but that you would like to indicate thereon that you are the author, that you would distribute the same only to your own clients, but anticipate a probability that they might pass the same on to others. You inquire as to the ethical propriety of this proposed course of action.

A petition by respondent to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on July 9, 1937.

[Civ. No. 10445. First Appellate District, Division One.—May 14, 1937.]

G. C. CROCE, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.

[1] ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—DISQUALIFICATION.—Where several clients associated in a business enterprise employ the same attorney to defend an action involving their common interest, the communications by said clients to the attorney, while privileged against strangers, are not privileged as between such parties, nor as between their counsel and any of them, when they later assume adverse positions in subsequent litigation between said clients; and neither said attorney nor the firm of which he is a member is to be restrained from participating in such subsequent litigation as counsel for one or more of said clients against the remainder.

[2] ID. — UNPROFESSIONAL CONDUCT—JOINT EMPLOYMENT BY SEVERAL CLIENTS—SUBSEQUENT ADVERSE EMPLOYMENT.—Rule 5 of the Rules of Professional Conduct (213 Cal. cxiv) and rule 37 of the Canons of Ethics of the American Bar Association, relating to employment adverse to a client or former client, are controlling in cases of disclosure to a stranger of confidential information obtained from a client, but said rules are not applicable in a case where an attorney, who was counsel for a number of clients in an action involving their common interest, is later engaged to represent a part of said clients in litigation against the remainder.

PROCEEDING in Mandamus to compel the Superior Court of the City and County of San Francisco to disqualify an attorney from acting in certain litigation. Peremptory writ denied.

The facts are stated in the opinion of the court.

Chandler & Quayle for Petitioner.

---

1. See 27 Cal. Jur. 50; 28 R. C. L. 558 (8 Perm. Supp., p. 6167).

EXHIBIT E

Hatfield, Wood, Perry & Maddux for Respondent.

KNIGHT, J.—The determinative question here presented is whether an attorney who has represented several clients associated in a business enterprise, in the defense of an action involving their common interest, wherein it was denied that a copartnership existed between them, is disqualified, and the law firm of which he later became a member is also disqualified, from afterwards representing one of those former clients as plaintiff in subsequent litigation instituted against his associates, wherein it is alleged that a copartnership did exist between them. After a hearing in the superior court pursuant to a motion made by the petitioner in that behalf, wherein evidence was introduced, the superior court held in the negative, and thereafter petitioner instituted this proceeding in *mandamus* to compel the superior court to enter its order disqualifying said attorney and the firm of which he is now a member from further participation in the latter litigation. We are of the opinion that the trial court's ruling should be sustained.

[1] The ground urged for such disqualification is that while said attorney was representing the common interests of all of said clients in the former litigation, he acquired confidential information from petitioner and his associates which is material, relevant and pertinent to the determination of the latter litigation, and that such information may be, and petitioner fears it will be, used in the latter litigation to the detriment, damage and prejudice of petitioner.

But it appears to be well settled, as stated in Thornton on Attorneys at Law (vol. 1, p. 183), that "When two or more clients employ the same attorney in the same business, communications made by them in relation to such business are not privileged *inter sese;* nor are such communications privileged as between any one of the parties and the attorney. It is the secrets of the client which affect his right that the law does not permit the attorney to divulge. By selecting the same attorney, and making their communications in the presence of each other, each party waives his right to place those communications under the shield of professional confidence." (See, also, *Wahl's Estate*, 218 Ill. App 295; *Stewart* v. *Todd*, 190 Iowa, 283 [173 N. W. 619, 180 N. W. 146, 20 A. L. R.

1272], and Chamberlayne, "The Modern Law of Evidence", vol. 5, p. 5281.) The same doctrine is adhered to in California. (*Harris* v. *Harris*, 136 Cal. 379 [69 Pac. 23]; *Estate of Bauer*, 79 Cal. 304 [21 Pac. 759].) As said in the latter case, "When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations." Therefore, in the present case the communications made by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged as between such parties nor as between their counsel and any of them, when later they assume adverse positions.

Petitioner points out that in the cases cited the question of disqualification arose when the attorney was called as an adverse witness. But in any situation the foundation of disqualification is the existence of a former confidential relationship, and while no cases precisely in point have been cited by either side, it would seem to follow necessarily that if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, it cannot be held that under the same circumstances he is disqualified from serving as an adverse attorney.

[2] Rule 5 of the Rules of Professional Conduct (213 Cal. cxiv) and rule 37 of the Canons of Ethics of the American Bar Association, cited by petitioner, are not applicable. They are controlling in cases of disclosure to a stranger of confidential information obtained from a client. For like reasons the California cases and code sections cited by petitioner in support of his position, notably *Galbraith* v. *State Bar*, 218 Cal. 329 [23 Pac. (2d) 291], and *Watchumna Water Co.* v. *Bailey*, 216 Cal. 564 [15 Pac. (2d) 505], are not in point.

The conclusions reached on the controlling issue above mentioned make it unnecessary to inquire into the remaining points urged by respondent in opposition to the granting of the petition. The peremptory writ is denied and the proceeding is dismissed.

Tyler, P. J., and Cashin, J., concurred.

nor influence, the nonunion workers are not within the class excluded by section 56(a) of the Unemployment Insurance Act. As helpless and inarticulate pawns situated in the no-man's land of the area of combat between employer and union, they belong, rather, to that very group for whom the benefits of the act are provided to mitigate the financial rigors of idleness stemming from the accident of involuntary unemployment.

The judgment is reversed with directions to issue a writ of mandate ordering that all charges made to or against the account of petitioner because of unemployment insurance payments to union office workers of petitioner during the period April 19, 1950, to May 4, 1950, inclusive, be removed from the books of the California Employment Stabilization Commission.

Moore, P. J., and McComb, J., concurred.

A petition for a rehearing was denied March 6, 1953, and appellants' petition for a hearing by the Supreme Court was denied April 7, 1953. Gibson, C. J., Carter, J., and Traynor, J., were of the opinion that the petition should be granted.

[Civ. No. 19366. Second Dist., Div. Three. Feb. 10, 1953.]

L. DEAN PETTY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; C. J. GIBSON et al., Real Parties in Interest.

[1] **Witnesses—Privileged Relationships—Attorney and Client.**—Where two persons mutually employ the same attorney to represent them as their common agent and attorney in a particular transaction, communications made to the attorney by either in the other's presence are privileged as to strangers but not as between either of the persons and the attorney.

[2a, 2b] **Id.—Privileged Communications—Attorney and Client.**—Where neither of two persons who engaged the same attorney to prepare certain documents involved in a business transaction between them gave to the attorney any confidential information entitled to the protection of the attorney-client privilege, the attorney is not disqualified to represent one of

---

[1] See Cal.Jur., Witnesses, § 37; Am.Jur., Witnesses, § 496.
McK. Dig. Reference: [1-3] Witnesses, § 76(8).

EXHIBIT F

the persons in an action against the other which involves the same transaction and documents.

[3] Id.—**Privileged Communications—Attorney and Client.**—Ordinarily an attorney for two parties is not the depositary of confidential communications from either which ought to be withheld from the other.

PROCEEDING to review an order of the Superior Court of Los Angeles County restraining petitioner from representing plaintiff and cross-defendant in a certain action. Order annulled.

Joseph Doyle and L. Dean Petty, in pro. per., for Petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, for Respondent.

Dolley, Knight, Woods & Hightower for Real Parties in Interest.

WOOD (Parker), J.—Petition for writ of review. Petitioner, an attorney at law, seeks an annulment of an order of the superior court restraining him from representing the plaintiff and cross-defendant in a certain action.

On March 21, 1952, the petitioner, as the attorney for the plaintiff hereinafter mentioned, commenced an action in the superior court of Los Angeles County, entitled *Joseph R. Neaves, Jr.* v. *C. J. Gibson, et al.*, wherein the plaintiff sought an accounting by defendants under the terms of certain agreements between plaintiff and defendants covering the drilling for oil on property known as the "Hawn Deal," and an accounting for expenses in connection with said drilling operations.

On April 6, 1952, defendants answered the amended complaint in said action and filed a cross-complaint. The demurrer of plaintiff and cross-defendant to the amended cross-complaint was set to be heard on October 15, 1952.

On September 12, 1952, the attorneys for said defendants obtained an order to show cause why petitioner herein should not be restrained from representing, as an attorney at law, the plaintiff and cross-defendant. The order was made upon the basis that it would be improper for Mr. Petty to represent Mr. Neaves, because Mr. Petty had been attorney for him and Mr. Gibson in the preparation of the agreements referred to in said action.

On October 1, 1952, the order to show cause was heard upon affidavits as follows: an affidavit of Mr. Knight (one of the attorneys for defendants) which affidavit was the basis for issuing the order to show cause; affidavits of the petitioner herein (Mr. Petty), the plaintiff Neaves, and Mr. Doyle, one of the attorneys for plaintiff; and counteraffidavits of Mr. Knight and defendant C. J. Gibson. On said October 1st, the court ordered that L. Dean Petty (petitioner) be and is restrained from taking any part in the maintenance or trial of the action as attorney of record for plaintiff and cross-defendant, or as attorney assisting any attorney of record for said party, or at all. It was stipulated that the superior court file might be considered by this court.

Petitioner contends that the court acted without and in excess of its jurisdiction; and that the order is wholly without support in the evidence. He argues to the effect that in view of the fact that he represented both Mr. Neaves and Mr. Gibson in the preparation of said agreements, and in view of the nature of such representation and agreements, there was no privileged communication as between him and Mr. Gibson; and that it was not improper for him to represent Mr. Neaves in said action.

The affidavit of Mr. Knight stated that: he is one of the attorneys for defendants in said action; he is also one of the attorneys for said defendants in an action pending in a municipal court, in which an assignee of Mr. Petty sued them for attorney's fees for legal services allegedly rendered for defendants, including the preparation of the certain contracts involved in the present superior court case of *Neaves v. Gibson*; that Mr. Petty testified, in his deposition in the municipal court case, as follows: that he was employed by Mr. Gibson and Mr. Neaves to prepare all the said contracts; Mr. Gibson directed him many times as to what to do, talked over his problems, and Mr. Petty researched the lease and advised him on it; he first rendered legal services to Mr. Gibson on December 28, 1950, when Mr. Gibson came to his office and outlined the proposed agreement with Mr. Neaves as to the acquisition of the Hawn oil lease, and as to the drilling operations; thereafter and before the next office conference, he had two or more telephone conversations with Mr. Gibson; the next office conference was between January 5th and 10th, when Mr. Gibson and Mr. Neaves were present and the entire deal was discussed at length; after Mr. Petty had outlined the agreements of the parties as he understood them, he told

Mr. Gibson that there was quite a bit of work to be done, and he asked Mr. Gibson who was going to be his attorney in the matter; and that Mr. Gibson replied: "Why don't you draw all the agreements for both of us?" Mr. Petty replied that he would be glad to do the best he could to record the agreements in accordance with their mutual understanding; he was instructed by both of them to draw the agreements; Mr. Petty drew the agreement dated January 11, 1951,[1] and also the drilling agreement bearing the same date.[2] The affidavit

[1]It may be stated generally that the agreement of January 11, 1951, provided that the Coast Exploration Company, Lee Gibson (brother of C. J. Gibson), and Neaves each owned, as tenants in common, an undivided one-third interest in an oil lease which had been made by George H. Hawn, as lessor, and Coast Exploration Company and Lee Gibson, as lessees, which said interests were subject to one-eighth landowner's royalty, and subject to an overriding royalty of 7½ per cent retained by Des Moines Oil Company, assignor of the lease; that C. J. Gibson and Coast Exploration Company are engaged in the business of drilling oil wells under the name of Gibson Drilling Company, and have entered into a drilling contract for re-drilling a well on the Hawn lease to a depth of 6,940 feet; that Neaves shall incur no obligation in the drilling of the well except as provided in the drilling contract, which provides for the payment by Neaves of $20,000; that Neaves agrees to lend, concurrently with the making of said agreement, $10,000 to Gibson and Coast Exploration Company to be used exclusively by them in drilling the well, and said loan to be evidenced by a promissory note; that if the well is a commercial well, the parties shall enter into an operating agreement which shall provide that the Gibsons and Coast shall be the operators, that all expense of operating the well shall be borne one-third by Lee Gibson, one-third by C. J. Gibson and Coast, and one-third by Neaves; that a certain part of the casing in the well will be exchanged for more suitable casing, and that the additional expense of such exchange will be paid from the oil production; that the Des Moines Oil Company, assignor of the lease, shall receive, in addition to its overriding 7½ per cent royalty, one-fourth of the production after paying the landowner and the overriding royalty, until the amount due to the Des Moines Oil Company for casing has been paid; that from the remaining production, after paying operating expense, Lee Gibson shall receive 5 per cent, C. J. Gibson and Coast shall receive 5 per cent, and Neaves shall receive 5 per cent; the balance of the production is to be paid to Neaves until he has received $30,000,—$10,000 in repayment of said amount advanced by Neaves, and $20,000 in repayment of amount paid by Neaves for drilling the well.

[2]It may be stated generally that the drilling contract between C. J. Gibson and Coast Exploration Company, doing business as Gibson Drilling Company (referred to as Coast), as parties of the first part, and Neaves, as party of the second part, provided that it is the desire of Coast and Neaves that for consideration of $20,000 to be paid by Neaves to Coast, Coast will re-drill a well on the Hawn lease to a depth of 6,940 feet in a manner particularly set forth in the agreement; that Coast shall pay all bills for labor, taxes and insurance, and shall, upon demand of Neaves, exhibit all payrolls and bills; that Coast may charge not more than $2,000 for depreciation of its drilling equipment; that Neaves shall pay Coast $10,000 upon the execution of the agreement, and $10,000 when the well is on commercial production, or when drilled to a depth of

of Mr. Knight stated further that Mr. Gibson held several conferences with Mr. Petty, in connection with the preparation of the contracts, at which Mr. Neaves was not present; Mr. Gibson also conversed by telephone with Mr. Petty about certain matters when Mr. Neaves was not present.

On February 12, 1951, Mr. Petty prepared a supplemental agreement[3] for said persons. On March 21, 1951, he prepared another supplemental agreement[4] for them. On March 22, 1951, he prepared another supplemental agreement[5] for them.

The affidavit of Mr. Petty stated that: he is the assignor of plaintiff in said municipal court case against C. J. Gibson for attorney's fees; Mr. Gibson, in his answer in that case, denied that legal services were performed for him by petitioner herein; Mr. Gibson, in his deposition in that case, testified that he did not employ petitioner as his attorney or agree to pay

---

6,940 feet; that Coast shall furnish all drilling equipment necessary to complete the well; that Coast will render to Neaves, not less than 20 days after completion of the well, a complete accounting of expenses; that Coast is operating solely as an individual contractor, and Neaves has no obligation in connection with the drilling, except for the payment of said $20,000.

[3]By that supplemental agreement, Neaves agreed to pay $19,720.51 to the Des Moines Oil Company for casing, and it was agreed that the 7½ per cent overriding royalty of the Des Moines Oil Company would be assigned to, or held for the order of, Neaves in consideration of said payment, and that the agreement of January 11, 1951, would be modified to provide that the balance of oil production, after paying said royalties of one-eighth and 7½ per cent and 5 per cent to each of the parties, should be paid to Neaves until he had been paid said $30,000 and $19,720.51, or $49,720.51; then after such repayment, Neaves would assign one-half of the 7½ per cent royalty to C. J. Gibson; and thereafter, after deducting operating expenses, the oil production should be divided equally among Coast, Lee Gibson and Neaves,— one-third each; that the $19,720.51 was advanced by Neaves upon C. J. Gibson's guarantee that the well would be a producing well; that if the well was not a producing one, C. J. Gibson agreed to reimburse Neaves for one-half of the loss occasioned by failure to recover the casing from the well.

[4]By that supplemental agreement, Neaves agreed to advance $12,000 additional to pay unpaid bills for expenses in connection with the well; and it may be stated generally that the agreement of January 11th was modified to provide that the balance of oil production after paying said royalties and 5 per cent to each of said parties, should be paid to Neaves until he had been paid said $49,720.51 and $12,000, or $61,720.51.

[5]By that supplemental agreement, it was agreed that Des Moines Oil Company was holding for the account of Neaves and C. J. Gibson the overriding royalty of 7½ per cent, and it may be stated generally that the agreement of January 11th was modified to provide that Coast and Gibson agreed to obtain from Des Moines Oil Company an assignment of said 7½ per cent royalty to C. J. Gibson and to obtain a permit from the corporation commissioner authorizing such assignment; that after Neaves has been paid $61,720.51, he will assign to Coast or C. J. Gibson, as directed by them, one-half of said 7½ per cent royalty.

him for legal services in preparing said agreements; petitioner has been attorney for Mr. Neaves for some years prior to filing the complaint herein, and in 1950 petitioner represented him in two oil well ventures similar to the one in the present case, wherein Mr. Neaves and Mr. C. J. Gibson were parties; in said other ventures Mr. Gibson was represented by other attorneys; about January 5, 1951, Mr. Gibson and Mr. Neaves came to his office and jointly engaged petitioner and instructed him, in the presence of each other, to draw all necessary agreements concerning the oil well venture known as the "Hawn Lease"; his services in the preparation of the agreements continued from approximately January 5th to March 31, 1951; he billed Mr. Neaves and Mr. Gibson each for one-half the legal services; thereupon Mr. Gibson denied that he had employed petitioner and he refused to pay for any part of said services; all communications made to petitioner in connection with the subject matter of the present action and the preparation of said agreements were commonly known by Mr. Neaves and C. J. Gibson; at no time during said negotiations or any conference did Mr. Gibson or Mr. Neaves communicate to petitioner any communications which were confidential in nature in that they were not fully disclosed and understood by all parties to the agreements and incorporated in the agreements; no controversy, to petitioner's knowledge, arose in connection with the agreements until approximately October, 1951, when questions regarding proper accounting of the agreements were raised, ultimately resulting in the filing of the present action on March 21, 1952.

The affidavit of Joseph Doyle, attorney at law, stated that: on April 1, 1952, he became associated with Mr. Petty in the representation of plaintiff Neaves in the present action; in the complaint in the municipal court case, it was alleged that C. J. Gibson became indebted to Mr. Petty for $775.85, that $124.70 of said amount had been paid leaving an unpaid balance of $651.15, and that the indebtedness was incurred on an open book account for services rendered by Mr. Petty at Mr. Gibson's request; in the verified answer of C. J. Gibson in said case he denied said allegations of the complaint; that as between the averments in said answer and the averments in the affidavit of Mr. Knight there is contrast and conflict—the answer "contending" there was no relation of attorney and client, and the affidavit "contending" there was such a relation; the said agreements in the present case are the type of agreement normally found in a joint oil well venture and

are not the type of agreement in which there would be any confidential communications; Mr. Gibson, in his deposition, denied that he engaged Mr. Petty as attorney to represent him in the preparation of any of said agreements or in any matter in connection with the present case.

The affidavit of Mr. Neaves, plaintiff herein, states that: Mr. Petty has been his attorney for some years prior to the filing of this action; about January 3, 1951, Mr. Gibson approached plaintiff for the purpose of entering into a joint oil well venture known as the "Hawn Lease"; in the initial conferences regarding the venture, they jointly consulted Mr. Petty regarding the preparation of the necessary agreements; they jointly employed and instructed Mr. Petty to prepare all necessary agreements in connection with said venture; many conferences were had in Mr. Petty's office at which both plaintiff and Mr. Gibson were present; other conferences were had between plaintiff and Mr. Gibson not in the presence of Mr. Petty; certain conferences were had by plaintiff and Mr. Gibson with Mr. Petty individually; all said conferences pertained exclusively to the Hawn oil well venture; all communications made to Mr. Petty by plaintiff and Mr. Gibson were commonly known to both plaintiff and Mr. Gibson; at no time, to plaintiff's knowledge and belief, were any communications made by Mr. Gibson to Mr. Petty regarding any matter other than the preparation of the said agreements; Mr. Gibson failed to give a proper accounting and failed to comply with the agreement, and an actual controversy with Mr. Gibson did not fully develop until October, 1951; no controversy arose between plaintiff and Mr. Gibson during the period that services were rendered by Mr. Petty; that to plaintiff's best knowledge and belief no confidences were made by plaintiff or Mr. Gibson to Mr. Petty in connection with said agreements which were not fully known to plaintiff and Mr. Gibson.

The affidavit of C. J. Gibson states that: during 1950 Mr. Petty represented Mr. Neaves in connection with several contracts affiant had entered into with Mr. Neaves; in the early part of January, 1951, affiant and Mr. Neaves entered into an oral agreement with respect to the Hawn lease; affiant began drilling under the lease about January 8th and wanted to get the oral agreement reduced to writing quickly; in order to save time as well as attorney's fees, affiant decided not to submit the contracts that were to be drawn to other counsel; neither Mr. Petty nor Mr. Neaves stated that he would be ex-

pected to pay a part of the attorney's fees, except as to the application to be made to the corporation commissioner for a permit to transfer an overriding royalty; the charge made by Mr. Petty for preparing such application was $124.70, which sum affiant paid promptly; it was affiant's understanding that he was not to pay any part of the attorney's fees except as to said application; about April 20, 1951, he received a letter from Mr. Petty which stated in part that Mr. Petty had assumed that he was being employed by all the parties to handle the legal matters in connection with the well and that his fees would be paid by all of them; affiant had several private conferences with Mr. Petty regarding the agreements when Mr. Neaves was not present; it is not true that no controversy arose until October, 1951; during August, 1951, he received seven letters from Mr. Neaves regarding various matters that were in dispute—one of the matters was whether an income tax return should be filed on a joint venture basis; in August, he received a letter from Mr. Neaves which stated that the agreements did not constitute a joint venture; also in August he received a letter from Mr. Neaves which referred to controversies then existing as to whether checks drawn on the California Bank should be signed by the parties, and as to interpretation of the agreements; affiant did not refuse or fail to give a proper accounting, or fail to comply with said agreements.

As above stated, this is an action for an accounting. In the amended complaint, it was alleged, among other things, that defendants (referring to C. J. Gibson, individually, and doing business as Gibson Drilling Company, Coast Exploration Company, a corporation, and Lee Gibson) have failed to pay the 7½ per cent royalty as prescribed under said agreements, and have withheld from plaintiff proceeds of sale of oil and gas from said well in excess of $25,000; defendants have refused to render a true accounting; they have charged against production expense costs not applicable thereto; they have taken pipe and casing for their own use and have refused to account therefor; and they have refused to deposit the proceeds of sale of oil and gas in the operating bank account.

In the answer to the amended complaint, the defendants alleged that about January 15, 1952, the defendant Coast Exploration Company transferred all its assets to C. J. Gibson; defendants carried on the drilling operations, and about February 14, 1951, they brought in a producing well and it has remained on commercial production; they have sold and

continued to sell oil and gas produced from the well and they have continued to make proper deposits of said proceeds; the proceeds at all times through December, 1951, were deposited in the California Bank in Beverly Hills; during March, 1952, plaintiff discontinued using the account in the California Bank as an operating account, and after plaintiff refused to sign a check in payment of landowner's royalty then due, defendants opened an account at the Bank of America as the operating account for the well, and they have deposited therein all funds derived from the sale of oil from said well, and the expenses of operating the well are paid by checks drawn upon said account. As an affirmative defense, defendants made allegations to the effect that in consideration for the loan of $10,000 and as a bonus therefor, defendants transferred a one-third interest in said lease to plaintiff Neaves; that said one-third interest was of a greater value than the sum allowed by law as compensation for making the loan; that the plaintiff in making the advance of $19,720.51 for the benefit of defendants exacted as a bonus an overriding royalty of 7½ per cent; that said bonus was of greater value than the sum allowed by law as compensation for making said advance; that prior to April 30, 1952, defendants had paid to plaintiff $35,787.67, and on said date they paid to plaintiff $25,932.84, which constituted payment of said sum of $61,720.51 and that plaintiff has been paid in full. They asked for judgment declaring plaintiff's interest in the lease ended.

In an amended cross-complaint, defendants alleged, as a first cause of action, to the effect that in paying plaintiff his share of the oil proceeds they had paid, according to certain computations (therein stated), $3,000 on account of a bonus exacted by him, and that plaintiff is indebted to defendants in treble that amount, or $9,000. As a second cause of action therein, they alleged to the effect that in paying plaintiff a part of the overriding royalty they had paid, according to certain computations (therein stated), $175.49 on account of a bonus exacted by him, and that plaintiff is indebted to defendants in treble that amount, or $526.47. They asked for judgment declaring plaintiff's interest in the lease ended.

A question here is whether the relationship of attorney and client existed between Mr. Petty and Mr. Gibson. Although the testimony of Mr. Gibson in his deposition in the municipal court case, regarding attorney's fees, is to the effect that he did not employ Mr. Petty as his attorney, it must be concluded,

from other averments in the affidavits in the present proceeding, that the relationship of attorney and client existed between them.

The other question herein is whether the attorney was disqualified to represent plaintiff Neaves against defendant C. J. Gibson. The determination of that question depends upon whether or not, in the matter of preparing the oil well agreements for his said clients, there was any communication to the attorney by his client Mr. Gibson which was confidential as against his other client Mr. Neaves.

Mr. Neaves and Mr. Gibson mutually employed Mr. Petty to represent them jointly in the matter of reducing to writing their agreements regarding the oil well lease. In order to indicate the nature of the legal services rendered, and to indicate the existence or nonexistence of confidential communications during such relationship, it has been necessary to set forth in some detail the provisions of said written agreements and the conversations had with respect to employing and instructing the attorney. There is nothing in the agreements or conversations, or in the nature of the transactions referred to therein, that indicates there was any confidential communication between the attorney and either Mr. Gibson or Mr. Neaves. [1] Where two persons mutually employ the same attorney to represent them as their common agent and attorney in a particular transaction, the communications made by either of them in the presence of the other to the attorney are privileged as to strangers to the transaction, but are not privileged as between either of them and the attorney. (See *Clyne* v. *Brock*, 82 Cal.App.2d 958, 965 [188 P.2d 263]; *Croce* v. *Superior Court*, 21 Cal.App.2d 18, 20 [68 P.2d 369]; *De Olazabal* v. *Mix*, 24 Cal.App.2d 258, 262 [74 P.2d 787].) "The reason assigned for the rule is that, as between the clients, communications made for the mutual benefit of all lack the element of confidentiality which is the basis of privileged communications." (58 Am.Jur., pp. 277-278, § 496.) In *Murphy* v. *Waterhouse*, 113 Cal. 467 [45 P. 866, 54 Am. St.Rep. 365], it was held that an attorney, who was attorney for both the maker and payee of a promissory note and who was present with them when the note was executed, was not disqualified as a witness in litigation between the parties based on the note. The court said (p. 470) that the communications between the parties and the attorney were not privileged. It was also said therein at pages 470 and 471: "The rule, however, is the same where the witness is attorney for only one

of the contracting parties. Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction, and the circumstances surrounding it, are inconsistent with the notion of a confidential communication between one of the parties and his attorney who happens to be present." In *Croce* v. *Superior Court*, *supra*, 21 Cal.App.2d 18, it was held that a former attorney for several persons was not disqualified from representing one of them as plaintiff in subsequent litigation against the others. It was said therein at page 20: ". . . if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, it cannot be held that under the same circumstances he is disqualified from serving as an adverse attorney." [2a] In the present case, the conversations of both parties with the attorney as to his employment, his instructions to reduce their oral agreements to writing, and the terms of their oral agreements, were in the presence of both parties and the attorney. At times, however, there were conversations between the attorney and one of the parties out of the presence of the other party. As above indicated, the agreements and the nature of the transaction are not such as to indicate there would be privileged communications as between either client and the attorney. The pleadings do not indicate an issue involving alleged confidential communications. The complaint in the action is for an accounting under the provisions of the agreements. The answer alleges a proper accounting, and the cross-complaint is based upon a theory of alleged usury. Mr. Gibson does not assert that any conversation which he had with the attorney out of the presence of Mr. Neaves was confidential. It is to be noted that Mr. Gibson testified in the municipal court case to the effect that Mr. Petty was not his attorney. Also, in the present proceeding he stated in effect that he did not understand that he was expected to pay any part of the attorney's fees. In view of those statements by Mr. Gibson, it is understandable that he does not assert that his conversation with the attorney out of the presence of Mr. Neaves was confidential. It is to be assumed, under the circumstances herein, that such conversation was not confidential. [3] "Ordinarily, the attorney for both parties is not the depositary of confidential communications from either party which ought to be withheld from the other." (58 Am.Jur., p. 278, § 496.) It is not to be assumed that Mr. Gibson, out of the presence of Mr. Neaves, gave to their attorney material information which

the attorney ought to withhold, as confidential information, from Mr. Neaves. [2b] The communications between Mr. Gibson and Mr. Petty were not privileged communications. Mr. Petty was not disqualified to be attorney for Mr. Neaves in said action of *Neaves* v. *Gibson*.

The order restraining petitioner from representing plaintiff and cross-defendant Neaves is annulled.

Shinn, P. J., and Vallée, J., concurred.

[Civ. No. 15394. First Dist., Div. One. Feb. 11, 1953.]

ORLIE A. HOLLAND, Appellant, v. LEROY FREEMAN KERR et al., Respondents.

[1] **Automobiles—Care as to Guests—Questions of Law and Fact—Nonsuit.**—In guest's action against automobile driver for injuries suffered when automobile collided with another car on a winding road, it is not error to grant a nonsuit where plaintiff testified that defendant was driving automobile the way plaintiff would have driven it, that the other car came suddenly around a curve 2 or 3 feet over the wrong side of the center, and that "there was no time to take any action by anyone," since the most such evidence shows is that defendant could be guilty only of ordinary negligence and neither the evidence nor any reasonable inference therefrom would justify a finding of willful misconduct.

[2] **Trial — Instructions — Cautionary Instructions: Presumption from Suppression of Evidence.**—In action for injuries sustained by occupant of automobile when it collided with another car which defendant was driving, it is proper to refuse plaintiff's instructions based on Code Civ. Proc., §§ 1963(5), 2061(6, 7) with respect to viewing weaker evidence with distrust and to presumption that evidence willfully suppressed would be adverse if produced, although defendant's photographs of scene of accident were admitted without the photographer having been identified, produced or his absence explained, where the photographs were identified by five witnesses, three of whom were disinterested, who testified that they truly

---

[1] See Cal.Jur.2d, Automobiles, § 333 et seq.; Am.Jur., Automobiles, § 237 et seq.

McK. Dig. References: [1] Automobiles, § 123(9); [2] Trial, §§ 177, 188; [3, 4] Evidence, § 307; [5] Automobiles, § 362-1; [6] New Trial, § 72.

[L. A. No. 25269. In Bank. June 19, 1959.]

LAWRENCE JOHN ARDEN, Petitioner, v. THE STATE BAR OF CALIFORNIA, Respondent.

[1] Attorneys—Relation to Client—Employment.—Where an attorney-client relationship exists, it is immaterial that no formal arrangements were entered into.

[2] Id.—Disciplinary Proceedings—Review.—In reviewing a disciplinary proceeding against an attorney, the precise wording of the findings of the Board of Governors is not of vital importance since the Supreme Court is not bound by the board's findings, though they are entitled to great weight. The Supreme Court is empowered to review the whole record.

[3] Id.—Disciplinary Proceedings—Hearing Before Local Committee.—Failure to comply with Rules of Procedure of the State Bar, rules 21(a), 24, prescribing time limits for preliminary hearings and on a notice to show cause in disciplinary proceedings against an attorney before the local committee, is not jurisdictional, in view of the fact that it is expressly stated in rule 29(a) that noncompliance with such time limits "shall not bar consideration of an action on a complaint nor any proceedings, formal or informal, as in these rules provided." The mere fact that the delay made the attorney's future uncertain for two years does not require dismissal of the disciplinary proceedings, and where during the interim he was engaged in an active practice, no prejudicial error appears because of the long duration of the proceedings.

[4] Id.—Disciplinary Proceedings — Hearing Before Local Committee.—The accused attorney was not improperly limited in his cross-examination of the complaining witness in a disciplinary proceeding before the local committee, though she was a difficult witness and hostile to the attorney, and though the committee, in an effort to obviate her temper tantrums which resulted in her absence from the proceedings on several occasions, limited the attorney's questioning, where this was only done when it was clear that nothing beneficial could be

---

[1] See Cal.Jur.2d, Attorneys at Law, §§ 137, 139; Am.Jur., Attorneys at Law, § 29 et seq.

[2] See Cal.Jur.2d, Attorneys at Law, § 127 et seq.

McK. Dig. References: [1] Attorneys, § 22; [2, 8, 11] Attorneys, § 174; [3, 4, 6] Attorneys, § 172(8); [5] Attorneys, § 172(7); [7, 9, 11] Attorneys, § 29; [10] Witnesses, § 74; [12] Attorneys, § 142; [13] Attorneys, § 141.

EXHIBIT G

secured from the witness by further questioning, where in case the evidence was important the committee gave the attorney broad leeway enabling him to bring out matters not in the scope of direct, and where, at times when the hostility and antagonism of the witness prevented her from answering the attorney's questions, the committee would suggest questions to the attorney or assume the questioning itself in order to ascertain relevant facts.

[5] Id.—Disciplinary Proceedings — Notice of Hearing — Amendment.—An amendment of the notice to show cause in the middle of disciplinary proceedings against an attorney before the local committee was proper where the amended notice merely elaborated on the charges contained in the original notice and made them more specific, opportunity was given the attorney as provided by Rules of Procedure of the State Bar, rule 30 (authorizing amendments to show cause at any time prior to conclusion of the hearing) to answer and prepare his defense against the charges stated in the amendment, and he did not object to the filing of the amended notice or submit an answer thereto.

[6] Id.—Disciplinary Proceedings — Hearing Before Local Committee.—An attorney who represented both an unmarried girl seeking adoption of her child and the couple who adopted the child did not violate Rules of Professional Conduct, rule 7, relating to representing conflicting interests, where the girl had knowledge of and consented to the attorney's representation of the couple in the adoption proceedings and no conflict of interest existed until some time after her consent to the adoption was filed.

[7a, 7b] Id.—Relation to Client—Assumption of Adverse Position. —An attorney properly represented both an unmarried girl seeking adoption of her child and the couple who later adopted the child where the communications from the girl to this couple and to the attorney and vice versa were not confidential, and where the attorney told the girl it would be necessary for him to give any party interested in the matter all the information that would come to his attention.

[8] Id.—Disciplinary Proceedings—Punishment.—In view of the fact difference of opinion among members of the State Bar, at the time of the claimed violation, as to whether the mere representation of both parties to an adoption, even with consent, constituted a violation of the rules of ethics, it was not proper to discipline an attorney for representing both parties, with their knowledge and consent.

[9] Id.—Relation to Client—Assumption of Adverse Position.—As part of a lawyer's dual representation of both parties to an

adoption, the lawyer must convey information from one party to the other.

[10] **Witnesses—Privileged Communications—Attorney and Client.**—Whenever the disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places on him.

[11] **Attorneys—Relation to Client—Assumption of Adverse Position.**—Where an attorney represented both an unmarried girl seeking adoption of her child and the couple who later adopted the child, and still later, after the girl had unsuccessfully demanded that the adoptive parents pay money or return the child, she made serious charges against the attorney which were part of a petition to set aside her consent to the adoption, and which called for refutation by the attorney, such charges could best be answered by the attorney by aiding the adoptive parents in preparing their defense.

[12] **Id.—Disciplinary Proceedings—Acts Involving Moral Turpitude.**—Where an attorney represented both an unmarried girl seeking adoption of her child and the couple who later adopted the child, his act, after the girl sought to revoke her consent to such adoption, in tape recording her telephone conversations, without her knowledge at the time, and disclosing the contents to adverse parties and threatening and attempting to use the recordings adversely to her interests, constituted a violation of Bus. & Prof. Code, § 6106, relating to commission of acts involving moral turpitude.

[13] **Id.—Disciplinary Proceedings—Acts Involving Moral Turpitude.**—"Moral turpitude," as used in Bus. & Prof. Code, § 6106, is broadly defined as conduct which is contrary to justice, honesty and good morals.

[14] **Id.—Disciplinary Proceedings—Punishment.**—An attorney who represented both an unmarried girl seeking adoption of her child and the couple later adopting the child, and who, after the girl sought to revoke her consent to such adoption, was guilty of moral turpitude in tape recording a conversation with the girl and threatening her with prosecution unless she desisted from her threat to interfere with and overturn the adoption, should be disciplined by public reprimand, rather than suspended from practice, where his motive and the character and acts of the girl could be considered in mitigation, he had the best interests of the child in mind at all times, and the disciplinary proceedings had been hanging over his head for more than three years.

---

[10] See Cal.Jur., Witnesses, § 23 et seq.; Am.Jur., Witnesses, § 400 et seq.

PROCEEDING to review a recommendation of suspension of an attorney for 30 days. Petitioner disciplined by a public reprimand, this opinion to constitute such reprimand.

Darling, Shattuck & Edmonds and Edward S. Shattuck for Petitioner.

Charles F. Howard and Garrett H. Elmore for Respondent.

THE COURT.—Petitioner seeks review of a recommendation of the Board of Governors of the State Bar that he be suspended from the practice of law for 30 days. Five of the 13 members of the Board of Governors participating in the proceedings voted against the recommendation, four on the expressed ground that the "degree of discipline recommended is too severe."

Petitioner was admitted to the practice of the law in 1951. At the time of the occurrences here involved he had been in practice for three years, and was 28 years of age. Prior to the filing of the original notice to show cause in this proceeding, no prior charge of misconduct had been filed against petitioner.

The notice to show cause was amended during the trial of these proceedings. As amended, it charged petitioner with (1) Violation of the confidence of a client in violation of section 6068, subdivision (e) of the Business and Professions Code; (2) Failing to fairly and honestly represent a client in violation of sections 6067 and 6068 of the Business and Professions Code; (3) Commission of various acts involving moral turpitude; (4) Misleading a judge in violation of section 6068, subdivision (d) of the Business and Professions Code; (5) Violation of rule 7 of the Rules of Professional Conduct by representing conflicting interests; (6) Violation of rule 5 of the Rules of Professional Conduct by accepting employment adverse to a client without the consent of that client; and (7) Wantonly disregarding the oath and duties of an attorney within the meaning of section 6103 of the Business and Professions Code.

The facts as found by the board, it having adopted in part the findings of the local committee, are as follows:

In early 1954 petitioner was employed by Miss Karen Mattson, an unmarried girl 18 years old, who told him that she was pregnant and that, when the child was born, she

wanted to have it adopted. Petitioner undertook to handle the problem, informing her that a public agency could handle the adoption, or that it could be handled privately. Miss Mattson preferred a private adoption. Petitioner first advised his client to tell her parents about her pregnancy, but she refused. He thereupon placed her in the home of one of his friends where she remained until the birth of the child. To assist in the deception of the parents, he arranged a false mailing address for her in Detroit.

Through the efforts of petitioner, Miss Mattson was introduced to several prospective parents. She selected a Mr. and Mrs. Abraham Cohen to be the adoptive parents of her child. At their request, and with the knowledge and consent of Miss Mattson, petitioner was employed to represent the Cohens in the adoption proceedings. Petitioner was paid $250 by the Cohens for this purpose. He was paid nothing by Miss Mattson.

The child was born in August of 1954, and, with Miss Mattson's consent, was immediately delivered to the Cohens. On August 26, 1954, the court appointed the Cohens guardians of the child. The petition, which had been filed by petitioner, contained the express consent of Miss Mattson to the appointment. Several days later, with Miss Mattson's knowledge and consent, petitioner filed a petition for adoption of the child on behalf of the Cohens.

In November of 1954 Miss Mattson told petitioner that she thought she now wanted to keep the child. She did not, however, request petitioner to take any legal action to revoke the guardianship or to in any way interfere with the adoption proceedings. In December, 1954, she apparently changed her mind again because, in that month, she gave her written consent to the adoption at a conference at the Los Angeles County Bureau of Adoptions.

On January 14, 1955, Miss Mattson visited the Cohens at their home and demanded $3,000 or the return of the child. Mr. Cohen told her to call him at the petitioner's office at a designated time on the following day. She telephoned that office three times. The first two of these telephone communications were tape recorded by petitioner. In the third telephone conversation, petitioner told Miss Mattson that he had advised the Cohens not to pay her, that he had recorded their prior conversations, that the recordings showed an attempt at extortion which was a criminal offense for which she could be prosecuted, that the tapes would be available in connection

with any action she might take to have her child returned, but that if the adoption went through without any action on her part to obtain the child, he would destroy the tapes. Thereafter petitioner discussed the matter of the tape recordings with the district attorney. The nature of this discussion does not appear in the record.

In March, 1955, the court granted a petition to have Miss Mattson's consent to the adoption set aside. This petition was filed by an attorney other than petitioner employed by Miss Mattson in January of that year. Prior to the hearing on the petition to revoke consent, an attorney was substituted for the petitioner as the attorney of record for the Cohens. Prior to and during this hearing the petitioner cooperated with the Cohens and their attorney in the preparation and conduct of their opposition to the petition. After the court had granted Miss Mattson's petition, petitioner was substituted as attorney of record for the Cohens. As their attorney he filed an appeal from the court's order, but was in turn substituted out of the case prior to any hearings or action on the appeal.

[1] The petitioner challenges some of these findings. He first challenges the finding that he "was employed by Miss Karen Mattson," on the ground that the record shows that no formal employment was ever entered into. The point is without merit. Obviously, an attorney-client relationship existed. The fact that there were no formal arrangements is immaterial. (*Brydonjack* v. *Rieck*, 5 Cal.App.2d 219 [42 P.2d 336].) It is of some significance that petitioner, throughout the hearings before the local committee, referred to his being "hired" by Miss Mattson.

As to the balance of the findings, petitioner does not claim that they are unsupported by the record or are erroneous, but does urge that they do not adequately present the facts. He contends that the findings should have shown that the petition to set aside the consent to the adoption was largely predicated on a personal attack on him. An examination of that petition discloses that it does contain serious charges against petitioner. As to the balance of the findings, petitioner would like them reworded so as to place him in a more favorable light. An examination of the record, however, discloses that the findings are reasonably accurate and do not omit any material facts.

[2] The precise wording of the findings is not of vital importance because this court is not bound by the board's

findings (*Higgins* v. *State Bar*, 46 Cal.2d 241 [293 P.2d 455]), even though such findings are "entitled to great weight" (*Light* v. *State Bar*, 14 Cal.2d 328 [94 P.2d 35]). This court is empowered to review the whole record. This has been done.

[3] The petitioner next attacks some of the proceedings before the local committee. He contends that the hearings before the local committee violated the Rules of Procedure of the State Bar in that they were of a far longer duration than provided for in rules 21(a) and 34. That the proceedings exceeded the time limits expressed in these rules is obvious. The original notice to show cause was filed May 15, 1956. Thereafter, there were certain delays exceeding the time periods set forth in the Rules of Procedure of the State Bar. Rule 21(a) prescribes certain time limits for preliminary hearings, and rule 34 prescribes certain time limits for the proceedings on a notice to show cause. But rule 20(a) provides that "the purpose of rule 21(a) and rule 34 is to expedite processing of complaints, the conduct of preliminary investigations and formal disciplinary proceedings, so that such matters shall be disposed of at the earliest practicable time. Failure to act within the time or times specified in rules 21(a) and 34 shall not bar consideration of an action on a complaint nor any proceedings, formal or informal, as in these rules provided."

Petitioner asserts, however, that rule 20(a) should not apply because in this case a "gross injustice" was done to him by the violation of rules 21(a) and 34. The claimed "injustice" done to the petitioner is that because of the delay his future was made uncertain for about two years. Undoubtedly this created a period of pressure and tension for petitioner, but this fact alone does not require a dismissal of these proceedings. The drafters of the rules knew, of course, of the inconvenience that would be occasioned by delays in disciplinary proceedings. Had they felt that compliance with rules 21(a) and 34 should be jurisdictional, they would have so stated. To the contrary, it was expressly stated that non-compliance was not jurisdictional. It should also be pointed out that petitioner admits that during the pendency of the proceedings, he has been engaged in an active practice. Under these circumstances, no prejudicial error appears because of the long duration of the proceedings.

[4] The petitioner next complains that he was unduly limited in his cross-examination of the complaining witness. Miss Mattson was a difficult witness. She was obviously hostile to petitioner. The record shows that she frequently

became emotionally upset. The local committee, in an apparent effort to obviate her temper tantrums which had resulted in her absence from the proceedings on several occasions, did limit petitioner's questioning. But the record also shows that this was only done when it was clear that nothing beneficial could be secured from the witness by further questioning. Where evidence was important the committee gave the petitioner broad leeway enabling him to bring out matters not in the scope of direct, and other evidence which was merely cumulative. The hostility and antagonism of the witness often prevented her from answering the petitioner's questions. At these times the committee would suggest questions to the petitioner, or assume the questioning itself, in order to attempt to ascertain the relevant facts. Under all the circumstances, it is clear that petitioner was not improperly limited in his cross-examination.

[5] The petitioner's next contention is that the amendment of the notice to show cause in the middle of the proceedings was erroneous and prejudicial. The original notice is dated May 15, 1956, and the amended notice was filed on August 24, 1956. The amended notice merely elaborated on the charges contained in the original notice, and made them more specific. The amendment was proper. Rule 30 of the Rules of Procedure provides that amendments to a notice to show cause may be made at any time prior to the conclusion of the hearing, and that the respondent must be given a reasonable opportunity to answer and prepare his defense against the charges stated in the amendment. Such opportunity was here given. Moreover, it should be mentioned that petitioner did not object to the filing of the amended notice or submit an answer thereto.

[6] The local committee concluded that petitioner had not violated rule 7 of the Rules of Professional Conduct, because Miss Mattson had knowledge of and consented to the petitioner's representation of the Cohens in the adoption proceedings, and also because no conflict of interests existed until some time after her consent to the adoption had been filed. This determination was correct.

Rule 7 provides that "a member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned." There is evidence in the record indicating that Miss Mattson gave her consent to petitioner's representation of the Cohens as early as June of 1954. Miss Mattson told petitioner she wanted the baby back

in November of 1954, but this appears to have been merely an illustration of her variable attitude toward the adoption. She later changed her mind again and signed the consent for adoption. Under these circumstances, it cannot be said that petitioner was improperly representing conflicting interests.

Strangely enough, although the local committee found petitioner had not violated rule 7, it found that petitioner had violated rule 5 of the Rules of Professional Conduct, which provides that "a member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

Since it had properly been found that the petitioner had not represented conflicting interests until some time after the consent to adoption had been filed, it is apparent that the found violation of rule 5 must have occurred after that time. It may be assumed that the found conflict is supposed to have occurred after the time Miss Mattson demanded money or the child, and after the time of the taped telephone conversations. Thus the claimed violation of rule 5 must be that after that time petitioner represented the Cohens and assisted them in the action to set aside the consent to adoption.

The cases show that these facts do not constitute a violation of rule 5. There are two cases discussed by the parties. In *Croce* v. *Superior Court*, 21 Cal.App.2d 18 [68 P.2d 369], the petitioner sought to disqualify the attorney who was representing the adverse party in a lawsuit. This attorney had formerly represented both of the parties. In *Petty* v. *Superior Court*, 116 Cal.App.2d 20 [253 P.2d 28], the petitioner, an attorney, sought to annul an order restraining him from representing a client in an action where he had formerly been employed by both litigants. In both cases the courts held that the attorney was properly representing one of the clients against the other client. The rationale for these decisions is that the common employment of the attorney removed the communications of the parties to one another and to the attorney from the privileged category. The communications not being deemed confidential, there is no impediment to or impropriety in the adverse representation by the attorney. In the Croce case, the petitioner urged the applicability of rule 5 of the Rules of Professional Conduct in support of its motion to disqualify. This contention was re-

jected, the court saying, at page 20 of 21 Cal.App.2d, that rule 5 was only "controlling in cases of disclosure to a stranger of confidential information obtained from a client."

[7a] The rule stated in these cases applies to the facts of the instant case. Here petitioner had been employed by both Miss Mattsen and the Cohens in the adoption proceeding. As has been pointed out above, this dual representation was found to be proper. The communications from Miss Mattson to the Cohens and to the petitioner, and vice versa, were, therefore, not confidential.

[8] It is suggested that the mere representation of both parties to an adoption, even with consent, may constitute a violation of the rules of professional conduct. On this issue the members of the Bar have expressed opposite views. In a handbook published in 1956 by the Continuing Education of the Bar entitled "Family Law for California Lawyers" it was urged that such dual representation was permissible. In the State Bar Journal of July-August 1957 (32 State Bar Journal 343) opinions to the contrary were published. The issue is a highly debatable one. No clear-cut rule on the subject has been announced. It is not proper to discipline an attorney for a violation of a claimed principle that was and is so highly debatable.

[9] Of course, as part of a lawyer's dual representation in such cases a lawyer must convey information from one party to the other. But this was fully disclosed to Miss Mattson.

Petitioner testified before the local committee: ". . . I told Miss Mattson that in a matter such as this, it would be necessary, if I were to handle her matter, for me to tell any party interested in the matter all the information that would come to my attention; and likewise, to tell Miss Mattson any information that would come to my attention with respect to the other party; that . . . there would be a complete and free exchange of all information, and there would be no confidences as such; that as against all third parties and the rest of the world, obviously, there would be a maintenance of confidences; and that unless I had the freedom of telling any interested parties all that I knew about Miss Mattson, including information that she gave me, including opinions I might have, and the result of any observations I might have made, and that I would likewise be able to make similar statements to her about the other parties, I would not be interested in representing her."

[7b] For these reasons, it does not appear that the information obtained by petitioner was confidential as between the parties to the adoption. The information not being confidential, there has been no violation of rule 5.

It should also be pointed out that in the proceeding to revoke consent Miss Mattson in her petition made a strong attack upon petitioner. [10] It has been stated that: "Whenever the disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him." (Thornton, Attorneys at Law, vol. I, § 127, p. 220; Canon 37, Canons of Professional Ethics of the American Bar Association.) [11] The charges made in Miss Mattson's petition were most serious and called for refutation by petitioner. Since these charges were a part of, if not the basis for, the petition to set aside the consent, it would appear that they would best be answered by aiding the Cohens in preparing their defense.

There remains for consideration the charge that petitioner committed acts involving moral turpitude in violation of section 6106 of the Business and Professions Code. In general, the acts alleged to involve moral turpitude are: (1) failure to give notice to Miss Mattson of the time and place of the hearing for the appointment of a guardian; (2) concealment of the mental illness of Miss Mattson's mother; (3) abandonment of the cause of a client; (4) participation in a plan to conceal the fact of pregnancy from Miss Mattson's parents; and (5) tape recording a telephone conversation of a client, or former client, without her knowledge at the time, and disclosing the contents to adverse parties and threatening and attempting to use the recordings adversely to the interests of a client or former client.

[12] The local committee concluded that only (2) and (5) were violations of section 6106. The board omitted (2) from its findings. Thus the only charge found to involve section 6106 is the tape recording incident. This, we believe, was a violation of the section.

After Miss Mattson had demanded $3,000 from the Cohens, and after petitioner had recorded his conversations with Miss Mattson, he told her "that the tape recordings would be available in connection with any action she might take to have her child returned" and "that if the adoption went through without any action on her part, seeking to return the child, that so far as I [he] was concerned, I [he]

would destroy the tapes." Petitioner contends that this statement was merely a statement of intent on his part and was not in any way a threat.

It is quite obvious that this constituted a threat. Miss Mattson's demand for $3,000 or return of the baby bordered on, if it did not constitute, attempted extortion. In the taped conversation between petitioner and Miss Mattson, petitioner told Miss Mattson that her demand was an attempt at extortion for which she could be prosecuted. Thus, it is clear that petitioner was threatening her with a prosecution unless she desisted from her threat to interfere with and overturn the pending adoption.

[13] "Moral turpitude, broadly defined, is conduct which is contrary to justice, honesty and good morals." (*Fall* v. *State Bar*, 25 Cal.2d 149, 160 [153 P.2d 1].) Petitioner's conduct, whether or not it constitutes attempted extortion (see *Libarian* v. *State Bar*, 38 Cal.2d 328 [239 P.2d 865], and *Lindenbaum* v. *State Bar*, 26 Cal.2d 565 [160 P.2d 9]), is such as to fall within this definition. Although petitioner is a young attorney and his conduct may have been prompted by the reprehensible actions of Miss Mattson, it is nonetheless conduct that cannot be countenanced.

[14] The board has recommended that petitioner be suspended for 30 days. We believe that, under the circumstances, that punishment is too severe. It will be remembered that four members of the Board of Governors believed that the punishment was excessive. Petitioner's youth and inexperience have already been mentioned. While the circumstances in which he acted can furnish no excuse, his motive and the character and acts of his client may be considered in mitigation in determining the measure of discipline. (*McGrath* v. *State Bar*, 21 Cal.2d 737, 741 [135 P.2d 1].) Clearly, at all times, petitioner had the best interests of the child in mind. Miss Mattson's character has been sufficiently indicated herein. Further, we must also consider that these proceedings have been hanging over the petitioner's head for more than three years. That, in itself, is a severe ordeal. (*Gray* v. *State Bar*, 7 Cal.2d 177, 181 [59 P.2d 1033].)

It is our conclusion that petitioner should be disciplined by a public reprimand and that this opinion shall constitute such reprimand. It is so ordered.

2 Ariz.App. 272

John D. NICHOLS and Nancy Nichols, husband and wife, individually, jointly and as a community, John D. Nichols Store Management Service, Inc., a corporation, Appellants,

v.

Charles J. ELKINS, d/b/a Miracle Mile Drug Center, Appellee.*

No. 2 CA-CIV 44.

Court of Appeals of Arizona.

Nov. 29, 1965.

Rehearing Denied Jan. 4, 1966.

Suit for dissolution of alleged partnership and for an accounting. The Superior Court of Pima County, Case No. 63248, Jack L. Ogg, J., rendered judgment challenged by cross appeals. The Court of Appeals, Hathaway, J., held that the trial court did not err in finding that a partnership existed, in failing to apply doctrine of laches and estoppel and statute of limitations as bar to plaintiff's recovery, in allowing value of good will to be included as partnership asset, or in allowing partner's attorney to represent him over defendants' objection and motion for disqualification; but held that, under statute, partner no longer shares in same ratio as prior to dissolution and his share of post-dissolution profits is amount earned by his interest in dissolved partnership.

Affirmed in part and reversed in part.

1. Partnership ⇐17

Where rights of third parties are not involved, intention of parties is decisive in determining existence of partnership.

2. Partnership ⇐53

Evidence sustained finding that partnership existed between parties.

3. Appeal and Error ⇐934(1)

Where jury's verdict was advisory, trial court's finding that partnership existed between parties determined judgment; and assumption of correctness applied to judgment.

4. Limitation of Actions ⇐60(3)

Time when right of action to sue for settlement of partnership affairs accrues, so as to set statute of limitations in motion, depends upon circumstances of each case. A.R.S. § 12-544, subsec. 2.

5. Limitation of Actions ⇐60(3)

Even if memorandum of terms of plaintiff's employment was delivered to plaintiff in 1955 and he also received at that time a copy of accounting statement for previous period which did not set operation up as partnership, plaintiff's right to an account of his interest in partnership did not accrue until partnership was dissolved in 1960, where he continued to receive until that date substantially the share of net profits to which he would have been entitled as partner. A.R.S. § 12-544, subsec. 2.

6. Equity ⇐84

Defense of laches is largely within sound discretion of trial court.

7. Partnership ⇐321

Under circumstances disclosed, including fact that any delay on part of plaintiff was engendered by defendants' repeated assurances, it was not an abuse of discretion to refuse to apply doctrine of laches against plaintiff's suit for judicial dissolution of alleged partnership and for an accounting.

8. Equity ⇐84

Whether plaintiff is chargeable with laches is matter to be determined according to circumstances of particular case.

9. Estoppel ⇐52

The elements of estoppel are (1) acts inconsistent with claim afterwards relied upon, (2) action by adverse party on faith of such conduct and (3) injury to adverse party resulting from repudiation of such conduct.

10. Estoppel ⇐118

In action for dissolution of alleged partnership and for an accounting defend-

* This appeal was filed with the Arizona Supreme Court and assigned to that Court's No. 7791. The matter was referred to this Court pursuant to § 12-120.23 A.R.S.

EXHIBIT H

ants had burden of showing by clear and satisfactory proof presence of all of elements of estoppel; and, on record presented, such burden was not sustained.

11. Partnership ⇐24

Estoppel to assert partnership could not be predicated upon plaintiff's alleged acceptance of benefits as employee where such benefits would have been same whether plaintiff was (1) defendants' employee or (2) an employee of partnership business in which he was partner.

12. Partnership ⇐67, 300

Generally, in absence of agreement to contrary, good will is partnership asset and should be accounted for on termination of partnership.

13. Partnership ⇐336(3)

Existence of good will was shown when successful operation of partnership business was proved.

14. Appeal and Error ⇐235
Reference ⇐31

If either party desires to controvert propriety of reference, proper practice is to move for revocation; failure to make such motion constitutes acquiescence and consent to reference; and question cannot be initially raised on appeal.

15. Appeal and Error ⇐750(1)

Assignment of error relative to inclusion of good will as partnership assets on accounting attacked, in effect, propriety of trial court's reference order which required master to state assets of partnership "including good will and the value thereof."

16. Appeal and Error ⇐1022(1)

Reviewing court may not properly set aside judgment which rests upon findings made by special master and adopted by trial court in partnership accounting case unless such findings are clearly erroneous.

17. Partnership ⇐332

In partnership accounting case referred to master and depending upon examination of books, master's conclusions have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. 16 A.R.S. Rules of Civil Procedure, rule 52(a).

18. Partnership ⇐332

Problem of reviewing master's findings of fact on partnership accounting is essentially same as problem of reviewing trial court's findings of fact when court is initial trier of facts.

19. Partnership ⇐336(3)

Determination as to value of partnership's good will was not clearly erroneous.

20. Attorney and Client ⇐21

Attorney's acceptance of employment to act in opposition to his former client is not ipso facto improper, and attorney is not disqualified if his subsequent employment has no reference to matters with which previous attorney-client relationship was concerned.

21. Attorney and Client ⇐21

Foundation of disqualification of attorney to represent interest adverse to that of former client is existence of former confidential relationship.

22. Witnesses ⇐199(2)

When two or more clients employ same attorney in same business, communications made by them in relation to such business are not privileged inter sese nor are they privileged as between any one of parties and attorney.

23. Witnesses ⇐199(2)

Communications made by clients in relation to business in which they have jointly employed attorney are privileged solely as to strangers; and as between themselves, either client can compel lawyer to testify against other as to their negotiations.

24. Attorney and Client ⇐21

Trial court in partnership accounting case did not err in refusing to disqualify plaintiff's attorney where duties required of him in such litigation did not conflict with those involved in his prior employment by defendants.

25. Partnership ⇐308

Statute gives partner choice of recovering interest on value of his share or a portion of post-dissolution profits, but he cannot have both. A.R.S. § 29-242.

26. Partnership ⇐327(2)

That portion of complaint requesting "interest as allowed by law" could not be construed as having reference to interest as allowed under statute to retiring partner on value of his share in dissolved partnership. A.R.S. § 29-242.

27. Partnership ⇐327(1)

Ambiguity of wording of complaint, in which plaintiff requested profits attributable to one-third ownership of business and not profits attributable to use of his right in property of dissolved partnership, negated any inference of choice between two alternative and inconsistent rights, and election to take profits rather than interest was not made by such complaint. A.R.S. § 29-242.

28. Partnership ⇐306

Election to take profits rather than interest was not required to be made until partner knew extent of profits earned during post-dissolution period. A.R.S. § 29-242.

29. Partnership ⇐306

Partner was not dilatory in exercising his right to take profits rather than interest where request for inclusion of post-dissolution profits and accounting coincided with date of master's appointment. A.R.S. § 29-242

30. Partnership ⇐306

Under statute, partner no longer shares in same ratio as prior to dissolution, and his share of post-dissolution profits is amount earned by his interest in dissolved partnership. A.R.S. § 29-242.

Fickett & Dunipace, by Fred W. Fickett and William S. Dunipace, Tucson, for appellants.

Price & Tinney by John Price, Tucson, for appellee.

HATHAWAY, Judge.

Charles J. Elkins filed suit in Superior Court, Pima County, on June 1, 1960, alleging that he owned a one-third interest in the Miracle Mile Drug Center and seeking judicial dissolution of the alleged partnership and an accounting. John D. Nichols and Nancy Nichols, husband and wife, and John D. Nichols Store Management Service, Inc., were named as defendants. The sole question submitted to the advisory jury was whether a partnership existed between plaintiff and defendants; the jury's verdict was in plaintiff's favor. Judgment was subsequently entered which awarded to the plaintiff a sum equal to the value of his one-third partnership interest as of May 14, 1960, date of dissolution of the partnership, plus interest at 6 per cent on said sum until paid. Defendants have appealed from this judgment and plaintiff has appealed from the portion of the judgment which allows interest and from the orders denying plaintiff's post-judgment motions. We shall consider each appeal individually.

DEFENDANTS' APPEAL

Basically the defendants contend that the court erred (a) in finding that a partnership existed (b) in failing to apply the doctrines of laches and estoppel and the statute of limitations as a bar to plaintiff's recovery (c) in allowing the value of good will to be included as a partnership asset and (d) in allowing plaintiff's attorney to represent him over defendants' objection and motion for disqualification.

[1, 2] The advisory jury heard a wealth of testimony concerning the action and conduct of the parties prior to the inception of the business and during the existence of the business relationship. The whole case hinged upon whether the testimony showed a partnership contract or an employment contract. The defendants' position in the court below, and the Nichols so testified, was that the plaintiff was a mere employee of the defendants, his remuneration for services being a monthly

salary of $400 plus a bonus of one-third of the net profits. Contrariwise, the plaintiff testified that there was an oral partnership agreement and that he owned a one-third interest in the business. Where the rights of third parties are not involved, the intention of the parties is decisive in determining the existence of a partnership. Tripp v. Chubb, 69 Ariz. 31, 34, 208 P.2d 312 (1949). The jury decided the factual dispute in plaintiff's favor and there was competent evidence to support its verdict.

[3] Since the jury's verdict was advisory, the trial court's finding that a partnership existed determined the judgment, and the assumption of correctness applies to the judgment. Merryweather v. Pendleton, 90 Ariz. 219, 223, 367 P.2d 251 (1962). Viewing the evidence in the light most favorable to the plaintiff and to sustaining the judgment, we will not disturb the trial court's determination that plaintiff was a partner. Deuel v. McCollum, 1 Ariz.App. 188, 400 P.2d 859, 862 (1965); Hurst v. Hurst, 1 Ariz.App. 227, 401 P.2d 232, 235 (1965).

[4, 5] Defendants contend that notwithstanding a partnership relationship, plaintiff was barred from recovering because the statute of limitations had run, plaintiff was guilty of laches and further was estopped to assert a claim.

A.R.S. § 12-544 provides:

> "There shall be commenced and prosecuted within four years after the cause of action accrues, and not afterward, the following actions:
>
> * * * * * *
>
> "2. By one partner against his copartner for a settlement of the partnership account, * * *."

Plaintiff was expelled from the drug business on May 14, 1960 and filed suit on June 1, 1960. Defendants, however, argue that plaintiff had notice in 1955 of their denial of the partnership relation[1] and his failure to file an action until more than four years later is a bar. It has been held in this jurisdiction that the time when the right of action to sue for the settlement of partnership affairs accrues, so as to set the statute of limitations in motion, depends upon the circumstances of each case. See Brand v. Elledge, 89 Ariz. 200, 206, 360 P.2d 213 (1961); Younis v. Griego, 72 Ariz. 369, 373, 236 P.2d 358 (1951).

The record discloses that plaintiff was expelled from the business on May 14, 1960. Prior to this date he received substantially the share of net profits to which he would be entitled as a partner—there had been no affirmative denial of his rights until this date. There being no evidence of an agreement to the contrary, the plaintiff's right to an account of his interest in the partnership as against the defendants did not accrue until the partnership was dissolved on May 14, 1960. A.R.S. § 29-243; Rowley, Partnership, 2d Ed., Vol. 2 § 45.1. We hold, therefore, that the limitations statute did not start running until the date of dissolution when plaintiff was excluded from the business. The trial court properly ruled that the limitations defense was without merit.

[6-8] For the same reasons we agree with the trial court that the doctrine of laches is equally inapplicable. As stated by the Supreme Court in Younis v. [illegible], supra:

> "* * * Whether or not plaintiff is chargeable with laches is a matter to be determined according to the circumstances of the particular case, * * *."

The defense of laches is largely within the sound discretion of the trial court. Brandt v. Brandt, 76 Ariz. 154, 160, 261 P.2d 978 (1953). We find no abuse of judicial discretion in refusing to apply the doctrine after due consideration of the circumstances. Defendants attempted to charge the plaintiff with making a "stale demand"

1. This alleged notice consisted of a memorandum of the terms of plaintiff's employment purportedly delivered to plaintiff and a copy of the accounting statement for the previous period which did not set the operation up as a partnership.

when in fact the record discloses that any delay on the part of the plaintiff was engendered by defendants' repeated assurances.

[9-11] Defendants challenge the correctness of the trial court's ruling that there was no estoppel. The elements of estoppel are (a) acts inconsistent with the claim afterwards relied on, (b) action by the adverse party on the faith of such conduct and (c) injury to the adverse party resulting from repudiation of such conduct. Holmes v. Graves, 83 Ariz. 174, 177, 318 P.2d 354 (1957). Defendants had the burden of showing by clear and satisfactory proof that all of the above-enumerated elements were present. Knight v. Rice, 83 Ariz. 379, 382, 321 P.2d 1037 (1958). They claim that plaintiff was estopped to assert a partnership because he accepted benefits as an employee which operated to defendants' detriment. We agree with the trial court that this claim is without merit. The alleged benefits would be the same whether plaintiff was either (1) defendants' employee or (2) an employee of a partnership business in which he was a partner. There has been no showing of conduct on the part of the plaintiff repudiation of which operated to defendants' injury. Absent such proof, the doctrine is inapplicable.

[12-19] After the jury returned a special verdict for the plaintiff, the trial court found the plaintiff owned a one-third interest in the drug store and dered appointment of a master to render an accounting to the court. Ascertainment of the value of plaintiff's interest on May 14, 1960 was referred to the master. The court further ordered:

> "In rendering said accounting, the master shall state further the assets of the partnership, *including good will and the value thereof*, and shall further determine the nature and amount of the partnership liabilities and obligations." (Emphasis ours.)

The master's report included good will as a partnership asset at a value of $35,000. After a hearing on objections to the report, it was approved in the judgment from which this appeal is taken. Defendants assign error to the inclusion of good will.

Generally, in the absence of an agreement to the contrary, good will is a partnership asset which should be accounted for on the termination of the partnership. 68 C.J.S. Partnership § 385c. Our Supreme Court, recognizing that good will of a business may be a valuable asset, referred to it as a "fleeting, intangible something." Jacob v. Miner, 67 Ariz. 109, 120, 191 P.2d 734 (1948).

Defendants contend that there was no evidence offered to fix the value of the alleged good will of the drug business. The existence of good will was shown during the trial when the successful operation of the business was proven. 38 C.J.S. Good Will § 2. The financial statements of the business for the years prior to dissolution were in evidence indicating that substantial net profits were earned.

No objections were made by the defendants to the order appointing the master and the order of reference. In effect, defendants' assignment of error relative to the inclusion of good will attacks the propriety of the trial court's reference. If either party desires to controvert the propriety of the reference, the proper practice would be to move for a revocation of the reference in the court below. Failure to make such a motion constitutes acquiescence and consent to the reference and the question cannot be initially raised on appeal. Coyner v. United States, 103 F.2d 629, 635 (7th Cir. 1939).

The master's report elaborated on the factors which were considered in arriving at the value of $35,000: (a) past earnings (b) trend of competition and (c) trend of earnings and general business conditions. Rule 52(a) of the Arizona Rules of Civil Procedure, 16 A.R.S., provides that the findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. This Rule also provides that findings of fact shall not be set aside unless clearly erroneous. We

therefore may not properly set aside a judgment which rests upon findings of fact made by a special master and adopted by the trial court unless such findings are clearly erroneous. Dyker Bldg. Co. v. United States, 86 U.S.App.D.C. 297, 182 F.2d 85, 87 (1950). The rule as laid down in Camden v. Stuart, 144 U.S. 104, 118, 12 S.Ct. 585, 590, 36 L.Ed. 363 (1891), as to the status of the master's findings is well stated:

> "In cases of this kind, referred to a master to state an account, depending, as they do, upon an examination of books * * * his conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.'"

The problem of reviewing the master's findings of fact is essentially the same as the problem of reviewing the trial court's findings of fact when it is the initial trier of facts. United States v. Village of Highland Falls, 154 F.2d 224, 227 (2d Cir. 1946). Defendants have failed to persuade us that the master's determination was clearly erroneous.

[20–24] The defendants' final contention of error is directed to the trial court's refusal to disqualify plaintiff's attorney from proceeding to trial on plaintiff's behalf. The affidavit of John Nichols filed in support of the motion for disqualification stated that an attorney-client relationship had existed between the law firm in which plaintiff's attorney was a partner and the defendants.

The principle which bars an attorney from representing an interest adverse to that of a former client is most often said to be grounded upon the confidential relationship which exists between attorney and client, the courts taking the view that, by imposing this disability upon the attorney, confidential information conveyed by the former client is protected from possible disclosure and wrongful use. See 52 A.L.R.2d 1243, 1250 § 4 and cases cited therein. An attorney's acceptance of employment, however, to act in opposition to his former client is not ipso facto improper. The attorney is not disqualified if his subsequent employment has no reference to the matters with which the previous attorney-client relationship was concerned. Gillett v. Gillett, 269 Mich. 364, 257 N.W. 719, 720 (1934); Klein v. Matthews, 99 Utah 398, 106 P.2d 773, 775 (1940); Adams v. Adams, 156 Neb. 778, 58 N.W.2d 172, 182 (1953).

The duties required of plaintiff's attorney in the instant litigation did not conflict with those involved in his employment by the defendants. Furthermore, as we have pointed out, the foundation of disqualification is the existence of a former confidential relationship. But when two or more clients employ the same attorney in the same business, communications made by them in relation to such business are not privileged inter sese nor are they privileged as between any one of the parties and the attorney. Croce v. Superior Court, 21 Cal. App.2d 18, 68 P.2d 369 (1937). The communications are privileged solely as to strangers, but as between themselves either client can compel the lawyer to testify against the other as to their negotiations. In re Estate of Bauer, 79 Cal. 304, 21 P. 759, 762 (1889). Since these communications are not deemed confidential, there is no impediment to or impropriety in the adverse representation by the attorney. Croce v. Superior Court, supra; Arden v. State Bar of California, 52 Cal.2d 310, 341 P.2d 6, 11 (1959). We hold that the trial court did not err in refusing to disqualify plaintiff's attorney. In so holding, we do not presume to pass upon whether such representation constitutes a violation of the Canons of Legal Ethics, such question not being before this court.

PLAINTIFF'S APPEAL

The judgment entered herein awarded to plaintiff the value of his interest in the partnership as computed by the master together with interest from the date of dissolution until paid. The plaintiff filed a motion for further accounting to determine the partner-

ship profits for the post-dissolution period and further moved that the judgment be amended to include a sum equal to one-third of the post-dissolution profits. These motions were denied and plaintiff appeals from that portion of the judgment which allowed interest to him and from the denial of the foregoing motions.

As authority for his position that he is entitled to profits, plaintiff relies on A.R.S. § 29-242 which provides:

> "When any partner retires or dies, and the business is continued under any of the conditions set forth in subsections A, B, C, E and F, of § 29-241, or, paragraph 2, subsection B, of § 29-238, without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; * * *."

[25] The statute clearly gives the plaintiff a choice of rights-interest on the value of his share *or* profits attributable to the use of his share. He cannot have both. The statute is silent as to when the election is required to be made. Our Supreme Court has held that an election made during trial is timely. Hurst v. Hurst, 86 Ariz. 242, 246, 344 P.2d 1001 (1959). In the case at bar, the plaintiff's complaint prayed:

> "(a) For an amount equal to one-third of the present value of said Miracle Mile Drug Center business;
>
> "(b) For increments, accumulations, and earnings of said one-third ownership and interest in said Miracle Mile Drug Center business."

[26, 27] Plaintiff contends that he elected to take profits thereby and cites Taliaferro v. Reirdon, 191 Okl. 43, 126 P.2d 696 (1942), for the proposition that a binding election to share in post-dissolution profits can be made in the complaint. Defendants argue, however, that the prayer of the complaint further requested "interest as allowed by law," and therefore no election was made. We cannot agree with defendants that the portion of the prayer requesting interest means interest as allowed under A.R.S. § 29-242 to a retiring partner on the value of his interest in the dissolved partnership. Were this the meaning intended by the plaintiff, it could have been expressed more explicitly, as for example "for interest on said one-third ownership and interest in said * * * business." However, in reading the above-quoted portions of the prayer for relief, we are not convinced that it clearly expresses an election to share in *post-dissolution* profits. We note that plaintiff requested profits attributable to a one-third ownership of the business—he did not request profits attributable to the use of his right in the property of the dissolved partnership.

We cannot accept plaintiff's argument that an election to take profits was asserted in the complaint. The ambiguity of the wording negates any inference of a choice between two alternative and inconsistent rights. Having determined that plaintiff had not exercised the option to take profits when the suit was filed, we are faced with the question of when he was required to indicate to the trial court his preference.

[28] We believe that the election was not required to be made until the plaintiff knew the extent of the profits earned during the post-dissolution period. Otherwise the right of election would be an illusory one. Moseley v. Moseley, 196 F.2d 663, 667 (9th Cir. 1952). Until a full accounting was made, including the period subsequent to dissolution, plaintiff was not equipped with sufficient knowledge to enable him to elect whether to claim interest or a share of the profits. Kreimson v. Commercial Nat. Bank, 323 Pa. 332, 185 A. 756, 757 (1936).

[29] We note in plaintiff's motion for further accounting the following:

"The Court will recall, on October 13, 1961, that counsel for plaintiff requested that the Court at that time direct the Court-appointed Master, Sidney Kaderlan, to include in his accounting, the profits of the partnership business from the date of dissolution, on May 14, 1960, through the date of the accounting. The Court, at this time, advised counsel for the Plaintiff that it was the Court's belief that Plaintiff was not entitled to share in said profits, that his interest in the profits terminated at the date of dissolution, May 14, 1960, * * *."

We find nothing in the record to controvert the above-quoted excerpt which indicates that the date of initial request for inclusion of post-dissolution profits in the accounting coincides with the date of the master's appointment. Therefore it cannot be said that plaintiff was dilatory in exercising his rights and the trial court erred in denying his motion for additional accounting.

[30] Plaintiff's contention that he would be entitled to a one-third share of post-dissolution profits is erroneous. The option as to receipt of post-dissolution profits accorded to a retiring partner under A.R.S. § 29-242 is receipt of "the profits attributable to the use of his right in the property of the dissolved partnership." He no longer shares in the same ratio as prior to dissolution. His share of post-dissolution profits would be the amount earned by his interest in the dissolved partnership, i. e., $12,122.04. To illustrate this simply, let us assume that the value of the retiring partner's interest at dissolution is $5,000 and the continuing partner's interest is $20,000. Irrespective of their proportionate interests prior to dissolution, the retiring partner's share in post-dissolution profits would be one-fifth.

The judgment is affirmed except as to the portion thereof awarding interest to the plaintiff on the $12,122.04, which is hereby reversed. The lower court is instructed to have an accounting of post-dissolution profits prepared for plaintiff's benefit and to allow plaintiff to elect as to interest or profits.

KRUCKER, C. J., and MOLLOY, J., concurring.

2 Ariz.App. 279
Charles W. NYE, Petitioner,
v.
The INDUSTRIAL COMMISSION of Arizona and Tietjen Tillage, Respondents.
Nos. 1 CA-IC 30, 1 CA-IC 31.

Court of Appeals of Arizona.
Nov. 29, 1965.

Writ of certiorari to review lawfulness of two awards of Industrial Commission. The Court of Appeals, Cameron, J., 406 P.2d 884, set aside the award and motion for rehearing was filed. The Court of Appeals, Cameron, J., held that when award of Industrial Commission has been set aside, new award may not be made without opportunity given to dissatisfied party for rehearing, and that award of Industrial Commission following granting of its confession of error and motion to remand was required to be set aside in view of failure to give claimant opportunity for rehearing.

Opinion reaffirmed as modified; motion for rehearing denied.

1. Workmen's Compensation ⇐1951

Rehearing is not always necessary for making of new award following setting aside by court of Industrial Commission's prior award; the parties may acquiesce in an award or commission might properly issue award without further hearing pro-